IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-310

DONALD R. SMITH, Treasurer of Illinois, MICHAEL J. BAKALIS, Comptroller of Illinois, ROBERT M. WHITLER, Department of Revenue of Illinois, JOHN W. CASTLE, Director, Department of Local Government Affairs of Illinois,

Petitioners,

vs.

ROBERT H. SNOW, individually and on behalf of all other taxpayers similarly situated, MARVIN E. SCHATZMAN, individually and on behalf of all other taxpayers of Cook County, Illinois, EDWARD J. ROSEWELL, as Treasurer and Ex-Officio Collector of Cook County, Illinois, STANLEY T. KUSPER, JR., Clerk of Cook County, Illinois, THE COUNTY OF COOK, a body politic and corporate, ILLINOIS CENTRAL GULF RAILROAD CO., a Delaware Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioners, Donald R. Smith, State Treasurer of Illinois, Michael J. Bakalis, Comptroller of the State of Illinois, Robert W. Whitler, Director of the Department of Revenue of Illinois, and John W. Castle, Director of the Department of Local Government Affairs of Illinois, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, entered in this proceeding on April 5, 1977.

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 66 Ill. 2d 443 (1977) and appended hereto as Appendix A. The judgment order of the Circuit Court of Cook County, Illinois, not reported, is appended hereto as Appendix B. The order and relevant parts of the decision of the Interstate Commerce Commission, 338 I.C.C. 805, 879-880, 940-1 (1971) are appended hereto as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on April 5, 1977. The order denying rehearing was entered May 27, 1977. This Court's jurisdiction is conferred by 28 U.S.C. 1257(3) and 2106.

QUESTIONS PRESENTED

Whether the 125-year-old Illinois Central Charter Property Gross Receipts Tax and related State statutes have been repealed by action of the Interstate Commerce Commission.

Whether the plenary power of the Interstate Commerce Commission to enforce its orders must be conclusively presumed to render State statutes invalid in a Section 5(2) voluntary reorganization when the State law was not in issue before the Commission and findings were not made to evidence or support such an intention nor an appropriate order entered to mandate such a result.

Whether Interstate Commerce Commission permission for a carrier to voluntarily reorganize pursuant to Section 5(2) of the Interstate Commerce Act operates to compel all parties necessary to the transaction to consent and by implication overrides State contract and corporation law to eliminate questions of proper legal title necessary to effectuate the reorganization.

Whether sound principles of federalism and comity require that an exercise of federal regulatory power in contravention of the Tenth Amendment to the United States Constitution not be presumed in the absence of a clear statement of intent to so act and an unavoidable situation for interposing federal preemption.

STATUTES INVOLVED

Tenth Amendment to the United States Constitution.

Interstate Commerce Act, Section 5(2), (11), 49 U.S.C. Section 5(2), (11).

An Act to Incorporate the Illinois Central Railroad Co., Section 18, 19, Ill. Rev. Stats. 1975, chap. 120, Sec. 373, 374.

The Business Corporation Act of 1933, Section 160, Ill. Rev. Stats. 1975, chap. 32, Sec. 157.160.

An Act to Increase the Powers of Railroad Corporations, Section 2, Ill. Rev. Stats. 1975, chap. 114, Sec. 166.

Pertinent text is set forth in Appendix D.

STATEMENT OF THE CASE

A.

The Special Illinois Charter and the Charter Property Gross Receipts Tax.

The Illinois Central Railroad Company was created by special legislative act on February 10, 1851. Under this legislative charter, the Illinois Central Railroad Company received a grant in trust of a two-hundred-foot right-of-way, together with such other lands necessary for ancillary uses, and approximately 2,595,000 acres of public lands adjacent to the right-of-way (R. C604, 757, 763), as well as other valuable assets, rights and privileges, for "the only and sole purpose of surveying, locating, constructing, completing, altering, maintaining and operating a railroad" and branches, pursuant to the covenants and conditions of the grant, as a "solemn and binding contract."

An Illinois Charter Property Gross Receipt Tax was simultaneously imposed upon the Illinois Central Railroad Company "in consideration of the grants, privileges and franchises . . . conferred upon said company." (Ill. Rev. Stat. 1975, ch. 120, sec. 373.) The annual tax now exceeds $5.6 million and since August 10, 1972, the date Illinois Central Railroad Company purportedly dissolved itself, collections have aggregated over $18 million (R. C399-400).

To further secure payment of of the tax, the Illinois Railroad Corporation Act, enacted in 1885 (Ill. Rev. Stats. 1975, ch. 114, sec. 166), provides in part:

> ". . . nothing herein contained shall be so construed as to authorize or permit the Illinois Central Railroad Company to sell the railway constructed under its charter, approved February 10, 1851, or to mortgage the same, except subject to the rights of the state under its contract with said company, contained in its charter, or to dissolve its corporate existence, or to relieve itself or its corporate property from its obligations to this state, under the provisions of said charter."

The Illinois Business Corporation Act, first adopted in 1919 (Ill. Rev. Stats. 1975, ch. 32, sec. 157.160) also contains the above provision.

B. The Reorganization

On or about May 16, 1968, Illinois Central Industries, Inc., a Delaware Corporation, of which Illinois Central Railroad Company is a wholly owned subsidiary, and Gulf, Mobile and Ohio Railroad Company, a Mississippi Corporation, filed with the Interstate Commerce Commission a voluntary petition for approval and authorization to consolidate and merge pursuant to 49 U.S.C. Sec. 5(2)(a). The plan was approved by the Commission in its decision rendered December 20, 1971. (338 I.C.C. 805). The State of Illinois was not a party to the proceedings before the Commission. The Commission did not decide any question concerning the power of the Illinois Central to unilaterally dissolve its Illinois corporate existence and transfer away its charter properties, so as to relieve it from its obligation to pay the Charter Property Receipts Tax and other duties and obligations existing under Illinois law.

C.
The Origin of the Case

This action originated on November 20, 1973, when the plaintiff, Robert H. Snow, filed his petition for leave to

file a complaint in the Circuit Court of Cook County, Illinois (R. C79-104). Plaintiff, as a citizen and taxpayer of the State of Illinois, sought to enjoin the State defendants from expending public funds to continue to collect the Charter Property Gross Receipts Tax from Illinois Central Railroad Company, and to enjoin Illinois Central from paying the tax to the state (R. C133-150). Over objection of all defendants, leave to file was granted (R. C132).

The amended complaint alleges that "effective August 10, 1972, Illinois Central [Railroad Company] effectively ceased to exist because it merged into [Illinois Central] Gulf [Railroad Co.] and conveyed all of its assets to Gulf" and the Charter Property Gross Receipts Tax "ceased to be of legal effect and became null and void." (R. C138).

Motions of defendants to strike and dismiss the amended complaint (R. C154; 157; 166; 184; 200) were overruled. (R. C215). Thereafter, motions of defendants for summary judgment (R. C382-414; 448-459; 482-499) were denied, and plaintiff's motion for summary judgment (R. C600-65) was allowed. (R. C936-946).

The judgment order of May 17, 1976, *inter alia,* finds: "5. That a plan of reorganization was approved by the Interstate Commerce Commission whereby the Illinois Central Gulf Railroad Company ("Gulf") acquired the assets of Illinois Central Railroad Company ("I.C.") and Illinois Central Railroad Company was to be dissolved. This plan became effective on August 10, 1972 and under said plan I.C. sold and conveyed all of its assets, including the Charter Property, to Gulf. . . . 10. That under the Plan of Reorganization, the Charter Property Tax did not be-

come an obligation of Gulf, and Gulf did not acquire I.C.'s exemption from all other taxation as described in Section 22 of the 1851 Charter." (R. C939-941).

The State defendants perfected a direct appeal to the Illinois Supreme Court. On April 5, 1977, the Court rendered its opinion which affirmed the judgment of the circuit court as modified, and remanded the cause for further proceedings. The State defendants' petition for rehearing was denied on May 27, 1977 .

D.

How the Federal Question Is Presented

The effect of the Interstate Commerce Commission's approval of the reorganization upon State law was first raised in the Answer of Illinois Central Gulf Railroad Company to the Amended Complaint (R. C219-23), and again in the Reply of Plaintiff Snow to Answer of Illinois Central Gulf Railroad (R. C301-2), and the Memorandum in Support of Certain Defendants' Motions for Summary Judgment. (R. C450, 455).

A suit had been filed by Illinois Central Railroad Company in the District Court to litigate the question whether the Illinois Central Special Charter had been "duly dissolved" over state objections, but the district court action was involuntarily dismissed on procedural grounds without ever reaching the substantive issue. (*Illinois Central Railroad Company* v. *Howlett,* 525 F. 2d 178 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976)).

In the case a bar, plaintiff expressly argued that:

> "There is no issue before this Court as to whether or not the I.C. is 'empowered to dissolve its corporate existence'; that issue is being litigated between the I.C. and the Illinois Secretary of State in Federal Court, and is not an issue which has been raised by any pleading in this case." (R. C625; 691; 920)

Intervening defendant Schatzman adopted the same position: that the matter had not been asserted in the Complaint, was not a direct issue in the case, had not been fully briefed and should not be a part of the final judgment or decree. (R. C920)

Intervening defendants, Rosewell, Kusper and Carey adopted this identical position. (R. C912)

Nevertheless, in its judgment order, the Court found that by virtue of the Commission's approval of the reorganization, the Illinois Central Gulf Railroad acquired the assets of the Illinois Central Railroad Company, including the charter property, and the Illinois Central was then dissolved.

In their brief filed with the Illinois Supreme Court, the State defendants again raised the issue whether the Special Illinois Charter of the Illinois Central Railroad, the Charter Property Gross Receipts Tax, and State laws prohibiting I.C.'s corporate dissolution and transfer of charter assets have been effectively repealed by the order of the Interstate Commerce Commission.

In its opinion, the Illinois Supreme Court, by relying solely on "federal grounds," rejected the State defendants' contention that the Illinois Central Railroad Company had no power under State law to dissolve its charter and transfer its charter property. Specifically, the Court found that any charter which would prevent the sale of the Illinois Central and all of its assets, including the charter property, would be overriden under 49 U.S.C. Sec. 5(11) in order to effect the transaction approved by the Interstate Commerce Commission. (66 Ill. 2d at 457-462).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE ILLINOIS SUPREME COURT ERRONEOUSLY CONSTRUES AND APPLIES THE PERMISSIVE ACTION TAKEN BY THE INTERSTATE COMMERCE COMMISSION AND ERRONEOUSLY PRESUMES THAT THE COMMISSION INTENDED AND EFFECTIVELY ORDERED THE STATE CHARTER PROPERTY GROSS RECEIPTS TAX AND RELATED STATE STATUTES TO BE OVERRIDDEN.

The Special Illinois Central Railroad Company Charter and statutes subsequently adopted prohibit the Railroad from unilaterally dissolving its corporate existence or relieving itself or its corporate property from its obligations to the State under the provisions of the Charter. One of the primary obligations of the Railroad under the Charter is the payment of the Charter Property Gross Receipts Tax to the State.

Over the past 124 years, every change or amendment to the charter operations of Illinois Central Railroad Company has been by mutual consent of the railroad and the State of Illinois, effected by appropriate legislative enactments and acceptance of the enactments by the corporate officers of the railroad. This has even occurred subsequent to the purported reorganization which triggered the instant action. (R. C454-5, 670-1)

The issue of whether the Illinois Central Railroad Company has the right to unilaterally dissolve its special charter existence, transfer away its charter property and thus relieve itself of its duty to pay the Charter Property

Gross Receipts Tax in contravention of Illinois law was not decided by the Interstate Commerce Commission, nor has the issue ever been adjudicated in a court of competent jurisdiction.

Nevertheless, the Illinois Supreme Court assumed that because the voluntary reorganization was approved by the Interstate Commerce Commission, any inhibiting State law was automatically nullified under 49 U.S.C. 5(11).

This erroneous view of the meaning of an order of the Interstate Commerce Commission cannot stand. It is premised upon a basic misunderstanding of the effect of Commission approval of a voluntary reorganization, is contrary to the Commission's own interpretation of its authority, and constitutes an unwarranted extension of federal jurisdiction into a matter of state concern.

A.

Interstate Commerce Commission Approval of a Section 5(2) Voluntary Reorganization Will Not Be Conclusively Presumed To Render State Statutes Invalid When The State Law Was Not In Issue Before The Commission and No Findings Were Made To Evidence or Support Such An Intention.

There is no dispute that under 49 U.S.C. 5(11), the Interstate Commerce Commission may exercise power to suspend inhibiting State laws to the extent necessary to effect a voluntary reorganization. The issue is not, however, what the Commission may have power to effectuate in an appropriate case, but rather what in fact the Commission did decide in reviewing the Illinois Central reorganization petition.

The decision of the Commission in the reorganization reveals no express intention to override the provisions of the Special Illinois Charter and related statutes. It did not find that Illinois law should be superseded, nor did it mandate such a result in its order. Nevertheless, the Illinois Supreme Court has supplied such an intention purely by implication and has thus invalidated the aforementioned Illinois laws.

This Court has never held that a decision of the Interstate Commerce Commission will automatically supersede State laws and powers where the Commission made no finding that such a result was intended. Rather, the decisions of this Court show that where State law is to be invalidated by an order of the Commission, the intention to override must be expressly set out the order.

As Chief Justice Hughes stated in this Court's opinion in *Florida* v. *United States*, 282 U.S. 194, 211-212 (1930):

> "The question in the present cases then, is not one of authority but of its appropriate exercise. The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that *whenever federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.*" (Emphasis added)

In *Seaboard Air Line R. Co.* v. *Daniel*, 333 U.S. 118, 124 (1948), relied upon by the Illinois Supreme Court in rendering its decision, this Court held that the appellant railroad company was relieved of the necessity of complying with certain South Carolina constitutional and statutory provisions because the Interstate Commerce Commission had expressly stated in its order that this was its intention.

In the absence of such specific findings, this Court has declined to presume that state laws and powers are automatically overriden by decisions of the Commission. *North Carolina* v. *United States*, 325 U.S. 507, 520 (1944). In *Arkansas Railroad Com.* v. *Chicago, R. I. & P. R. Co.*, 274 U.S. 597 (1926), the issue was whether an order of the Interstate Commerce Commission had extended to intrastate rates. At page 603 of the opinion, Justice Brandeis wrote:

> "The intention to interfere with the state function of regulating intrastate rates is not to be presumed. Where there is serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power."

The Court further noted that if the railroad believed that the Commission had intended to include the intrastate rates within its order, the railroad should have taken action to secure an express statement from the Commission that such was its intention. Similarly, if the Illinois Central felt that the Illinois Charter Property Law should be overridden, it had a duty to request a specific ruling on the issue by the Commission. It did not.

The Commission made no specific findings that the Illinois charter law should be overriden. The Illinois Supreme Court nevertheless assumed that such an intention was implied in the Commission's finding that the reorganization was in the public interest.

State laws, however, should not be so lightly set aside.

As this Court held in *Illinois Central Railroad Co.* v. *Public Utilities Commission*, 245 U.S. 493, 510 (1918):

> "In construing federal statutes enacted under the power conferred by the Commerce Clause of the Con-

> stitution, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. *Reid* v. *Colorado,* 187 U.S. 137, 148; *Cummings* v. *Chicago,* 188 U.S. 410, 430; *Savage* v. *Jones,* 225 U.S. 501; *Missouri, Kansas & Texas Ry. Co.* v. *Harris,* 234 U.S. 412, 419. This being true of an act of Congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a State rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty."

If the Commission had intended to override the provisions of the special Illinois charter and related statutes, it would have said so. No such intention was stated or implied, and the Illinois Supreme Court was clearly in error when it supplied such an intent by pure implication and effectively repealed several Illinois statutes.

B.

The Commission's Approval Of A Voluntary Reorganization Should Not Be Construed So As To Compel All Necessary Parties To Consent, Nor Should It Be Construed So As To Imliedly Override State Contract And Corporation Law To Eliminate Questions Of Proper Legal Title.

The Illinois Supreme Court apparently believed that Commission approval of the reorganization meant that the transaction was of necessity to be accomplished, regardless of any questions remaining to be resolved under Illinois law. This is contrary to the Commission's own view of its powers.

Commission review and approval in any proposed reorganization is a federal statutory precondition to the com-

pletion of such transaction. But, its approval of a reorganization is permissive only, and not mandatory. The Commission has described its authority as follows:

> "As to vendor's desire to withdraw from the transaction, we have repeatedly found that authority granted under former section 213 and present section 5 is permissive only, and may, or may not, be exercised by the parties, and that all matters involving the interpretation and enforcement of the terms of contracts must be left for settlement between the parties themselves or by the courts." *McGary Transportation Co., Inc. – Purchase – DeMelle,* 50 MCC 608, 611 (1948).

In *Central Freight Lines, Inc. – Control – Alamo Exp.,* 90 MCC 96, 100-101 (1962), the Commission further stated:

> "Our function under the statute is to determine whether the transaction proposed will be consistent with the public interest, and whether the terms and conditions proposed, subject to such conditions or modifications as we may require, are just and reasonable. . . . Whether the transaction will be consummated, or consummation could be legally compelled by applicants, is not for us to decide. Our authority is permissive only. We cannot force consummation of any transaction approved by us under section 5. In our view, the fact that the transaction conceivably may not be consummated under the modified terms does not inhibit our authority to approve the transaction on the revised terms proposed by applicants."

Clearly, where such a reorganization is voluntary and by request of the carriers, an I.C.C. order does not *mandate* that the action be taken nor *compel* any dissenting party to conform.

In *Texas & N. O. R. Co.* v. *Brotherhood of Railroad Trainmen,* 307 F. 2d 151, 159-60 (6th Cir. 1962), cert. den. 371 U.S. 952, 83 S. Ct. 508 (1963), Reh. den. 375 U.S. 871, 84 S. Ct. 28 (1963), the Court said:

"Now, are we to read into the authority of the ICC to 'approve' a transaction, the right of the carrier to unilaterally create one of the contracts which may be necessary to the completion of that transaction and thereupon bind a third party to it? Clearly, that does not follow as a matter of course from the normal meaning of the terms used in section 5(2)(a).

"Nor has the ICC, in its interpretation of section 5(2), found any such hidden authority. *It looks upon its duties as purely permissive, approving with appropriate conditions contracts, agreements, and consolidations which are negotiated by the parties under the normally applicable law governing such transactions in other fields.* As the Commission has often held, it has no power to compel a carrier to undertake a section 5(2)transaction. . . .

"From these cases, we believe the Commission is of the opinion that the carriers must rely upon applicable contract and corporate law to carry their section 5(2) transaction into effect, and may not rely upon the Commission's 'approval' to coerce a recalcitrant party into line." (Emphasis added)

Even if the proposed partners to a reorganization agree, a voluntary reorganization still cannot be legally consummated unless under state law all the necessary parties to such a merger or consolidation have proper title to the rights and property which they wish to bring into the reorganization and are able to execute the necessary contracts to accomplish the transaction.

The law is most clearly stated by the United States Supreme Court in the recent Northern Lines merger cases, *United States* v. *Interstate Commerce Commission,* 396 U.S. 491, 526 (1970). Chief Justice Burger said:

"The premise of Livingston's position is that under this statute before the Commission can assume jurisdiction over a merger application it must determine

that the applicants have proper legal title to the rights and property which they seek to bring into the merger. This is an erroneous assumption. The Commission is not required to deal with the subtleties of "good title' before assuming jurisdiction over a section 5 matter. Cf. *O. C. Wiley & Sons* v. *United States,* 85 F. Supp. 542, 543-545 (D. C. W. Va.), aff'd per curiam, 338 U.S. 902 (1949); *Walker* v. *United States,* 208 F. Supp. 388, 396 (D. C. W. D. Tex. (1962); *Interstate Investors, Inc.* v. *United States,* 287 F. Supp. 374, 392 n. 32 (D. C. S. D. N. Y. 1968), aff'd per curiam, 393 U.S. 479 (1969). *And because a Commission order under section 5(2) 'is permissive, not mandatory,' New York Central Securities Corp.* v. *United States,* 287 U.S. 12, 26-27 (1932), *the approval of a merger proposal does not amount to an adjudication of any such questions. These are matters for the courts, not for an agency that has responsibility in the realm of regulating transportation systems."* (Emphasis added)

The I.C.C. order entered December 20, 1971, did not consider or decide any issues existing between the State of Illinois and Illinois Central Railroad Co. concerning good title. These were left to the courts to resolve, and were the subject matter of *Illinois Central Railroad* v. *Howlett,* 525 F. 2d 178 (7th Cir. 1975), cert. den. 424 U.S. 976 (1976), which was dismissed on procedural grounds without reaching the merits of the case. They are the issues remaining to be adjudicated in a court of competent jurisdiction on proper pleadings where the parties are correctly aligned.

C.

The Rights And Obligations Created In The Charter Between The Railroad And The State And The State's Tenth Amendment Powers May Not Be Abrogated Merely By Commission Approval Of The Plan Of Reorganization.

The Charter of the Illinois Central Railroad is a solemn contract between the State and the Railroad which cannot be altered or abandoned without the consent of both contracting parties. *Illinois Central R. Co.* v. *Emmerson,* 299 Ill. 325, 132 N.E. 471 (1921); *People ex rel. Chicago* v. *Illinois Central R. Co.,* 235 Ill. 374, 85 N.E. 606 (1908); *Neustadt, et al.* v. *Illinois Central R. Co.,* 31 Ill. 484 (1863). Central to the Charter is the obligation of Illinois Central to pay the 7% Charter Gross Receipts Tax to the State. The annual tax now exceeds $5.6 million and since August 10, 1972, the date Illinois Central purportedly dissolved itself, collections have aggregated over $18 million. (R. C399-400)

Decisions of this Court have consistently held that railroad corporations cannot unilaterally absolve themselves from the performance of their obligations under their charters without the consent of the State legislature.

In *Thomas* v. *West Jersey R. Co.,* 101 U.S. 71, 83 (1879), this Court said:

> "* * * [W]here a corporation, like a railroad company, has granted to it by charter franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposed is a violation of the contract with the State, and is void as against public policy."

See also *York & M. L. R. Co.* v. *Winans,* 58 U.S. 30, 39 (1854); *Branch* v. *Jesup,* 106 U.S. 458, 463 (1883); *Pennsylvania R. Co.* v. *St. Louis A. & T. H. R. Co.,* 118 U.S. 290, 313 (1886); *Central Transportation Co.* v. *Pullman's Palace Car Co.,* 139 U.S. 24, 41 (1891).

The Illinois Supreme Court in its opinion recognized the fact that a contract exists between the State and the Railroad when it stated: "The contractual nature of the charter and the 7% charter tax imposed on IC therein are firmly established." (66 Ill. 2d at 455). Nevertheless, the court's decision effectively denied the State the opportunity to assert its rights under the contract by regarding Commission approval of the plan as conclusive on all issues.

As the authorities set out in Part B of this Petition clearly show, the Commission refrains from adjudicating the contractual disputes that may arise between the parties.

Furthermore, where federal jurisdiction impinges upon an area traditionally reserved to the States under the Tenth Amendment (taxation in the instant case), this Court has always required a clear intent to supersede State laws and an actual conflict between State and federal authority. As stated in *Palmer* v. *Massachusetts,* 308 U.S. 79, 84 (1939):

> "Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress."

In discussing the resolution of a controversy concerning the respective powers of the federal government and the states over railroads engaged in interstate commerce, Justice Brandeis wrote in *Lawrence* v. *St. Louis–San Francisco Ry. Co.*, 274 U.S. 588, 595 (1926):

> "The delimitation of the respective powers of the two governments requires often nice adjustments. The federal power is paramount. But public interest demands that whenever possible conflict between the two authorities and irritation be avoided. To this end it is important that the federal power be not exerted unnecessarily, hastily, or harshly. It is important also that the demands of comity and courtesy, as well as of the law, be deferred to."

In its decision, the Illinois Supreme Court assumed that the Interstate Commerce Commission intended to repeal the Illinois State Charter Law and related statutes, and effectively denied the State its right to collect the 7% Charter Property Gross Receipts Tax. Sound principles of comity and federalism require that an exercise of federal regulatory power in contravention of the Tenth Amendment not be presumed in the absence of a clear statement of intent to so act and an unavoidable situation for interposing federal preemption. Since the Commission expressed no intention to override Illinois law in its order approving the reorganization, the Illinois Supreme Court was clearly in error.

CONCLUSION

For 125 years since its creation, the State of Illinois has imposed a Charter Property Gross Receipts Tax upon the Illinois Central Railroad Company "in consideration of the vast and valuable grants, privileges and franchises . . . conferred upon said company."

To secure payment of the tax, maintenance of the charter lines, and faithful performance of the other duties and obligations imposed by law upon Illinois Central Railroad Co., the railroad is prohibited from dissolving its Illinois Corporate existence or transferring away its property so as to relieve itself from its obligations to this State under the provisions of its special charter.

Over the past 124 years, every change or amendment in the charter of the Illinois Central Railroad Company has been by mutual consent of the railroad and the State of Illinois, effected by appropriate legislative enactments and acceptance of the enactment by the corporate officers of the railroad.

The Illinois Central Railroad Company petitioned the Interstate Commerce Commission for federal permission to voluntarily reorganize its corporate structure pursuant to section 5(2) of the Interstate Commerce Act.

The Interstate Commerce Commission was not petitioned to override the Illinois Central Charter Property Gross Receipts Tax or the related Illinois statutes which secure the tax. The Commission made no findings and entered no order to mandate the repeal of the Illinois laws.

The Illinois Supreme Court erroneously concluded that the Interstate Commerce Commission had ruled that the reorganization must be effected and, consequently, the Charter Property Gross Receipts Tax and related statutes were nullified.

The decision of the Illinois Supreme Court is premised upon an uncorrect view of the meaning of the Commission's order and the impact of federal law, and is nothing less than "petitio principlii." Where a State's Tenth Amend-

ment powers are at stake, the principles of comity and federalism require a definite statement of intent to override State law, and such an intent may not be supplied by implication, as the Illinois Supreme Court has done here.

WHEREFORE, for these reasons, Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the Illinois Supreme Court entered April 5, 1977.

Respectfuly submitted,

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APPENDIX A

OPINION OF THE ILLINOIS SUPREME COURT
(66 Ill. 2d 443)

MR. JUSTICE MORAN delivered the opinion of the court:

In 1851, by "An Act to incorporate the Illinois Central Railroad company" (1851 Private Laws of Illinois 61, hereinafter, the charter), the Illinois General Assembly authorized construction of a railroad line between Chicago and Cairo with a branch to the Mississippi River via Galena, and granted for that purpose a 200-foot right-of-way and approximately 2.6 million additional acres along that right-of-way. Most of this land derived from Federal land grants of the prior year. The line constructed pursuant to this charter (the charter line) includes 705.5 miles of main line. This, in addition to 1,820 miles of non-charter-line track, was operated by the Illinois Central (IC) until August 10, 1972, when, pursuant to a plan of reorganization (Plan) approved by the Interstate Commerce Commission (Commission), the IC sold and conveyed all of its assets to the defendant, Illinois Central Gulf Railroad Company (Gulf), a newly formed Delaware corporation, in exchange for stock. The IC distributed this stock to its shareholders and purportedly dissolved. Gulf has since owned and operated the IC's former charter line and the noncharter lines, as well as the former Gulf, Mobile & Ohio Railroad lines. In the same manner as the IC before it, Gulf has paid the 7% gross revenue tax imposed on IC's charter line. This tax, under sections 18 and 22 of the charter (which may be found, as modified, in Ill. Rev. Stat. 1975, ch. 120, pars. 373, 374), was imposed on IC in lieu of ordinary taxes. Gulf, likewise, has paid it in lieu of other taxes, and it has been thus accepted for the years 1972 through 1975 without challenge by the defendant State of Illinois officials (State).

The instant dispute arises from the claim of Robert H. Snow, an Illinois taxpayer, that State funds are being disbursed to effect the collection from Gulf of the illegal 7% tax on charter properties. He brings this action under "An Act in relation to suits to restrain and enjoin the disbursement of public moneys by officers of the state" (Ill. Rev. Stat. 1975, ch. 102, par. 11 *et seq.*) (the Public Monies Act). The essence of the action is that this 7% tax was an exemption personal to IC, not applicable to Gulf, and is being illegally collected in lieu of other taxes which would ordinarily be due from the charter line. Marvin E. Schatzman (as a Cook County taxpayer), Edward J. Rosewell (as Cook County treasurer), and Stanley T. Kusper, Jr. (as Cook County clerk), intervened. On cross motions, the circuit court rendered summary judgment for the plaintiff on May 17, 1976, finding that under the plan of reorganization the tax on the charter line did not become an obligation of Gulf, and Gulf did not acquire IC's special tax exemption. The chancellor decreed IC dissolved, enjoined the State from continuing to collect the charter tax from Gulf and from expending public funds in connection therewith, and ordered the Director of the Department of Local Government Affairs, effective August 10, 1972, to "assess the Charter Property in the same manner as he assesses the property of other railroads in the State" and to "transmit the lists and information to the various proper taxing authority of the Illinois counties in which Charter Property is located."

On appeal, Gulf urges that the charter property tax obligation and corresponding immunity from other tax were contract rights passed to Gulf by virtue of the Commission's approval of its plan of reorganization. Gulf further urges that, should this court disagree with this

proposition, the trial court's order requiring Gulf's charter line to be assessed in the same manner as other Illinois railroads should be applied prospectively only.

The State agrees with Gulf that the 7% charter tax is due and owing, but contends it is due from IC; that the contract rights created in the charter between IC and the State may not be unilaterally abrogated by the IC or by the powers of the Commission to approve the Plan. Additionally, the State asserts that Snow lacks standing to attack the voluntary payments of a tax by another, and that administrative review, rather than suit under the Public Monies Act, is the proper vehicle for this action.

With reference to the question of standing and appropriateness of this action under the Public Monies Act, the State asserts that the amounts collected by the 7% tax total over $5.6 million per year, whereas the $41,400 expended in auditor's salary for its collection are *de minimis*, and that therefore Snow and the other taxpayers he represents have no interest in preventing the token expenditure. The State ignores the fact evidenced by the record that the time of literally hundreds of State employees is devoted in some part to the assessment and collection of this tax. Furthermore, there is no requirement that a taxpayer's individual interest in a suit under the Public Monies Act be substantial. In the case of *Krebs* v. *Thompson* (1944), 387 Ill. 471, 475-76, the court acknowledged that, "[u]nder the settled rule in this State, every taxpayer is injured by the misapplication of public funds, whether the amount be great or small. Such injury is not prevented by the fact that the State may thereafter receive fees under an unconstitutional statute in excess of the cost of its administration." Long before the enactment of the Public Monies Act, the citizens and taxpayers of this

State have been permitted to sue to enjoin the misuse of public funds. (See *Barco Manufacturing Co.* v. *Wright* (1956), 10 Ill. 2d 157, 160, and *Fergus* v. *Russel* (1915), 270 Ill. 304, 314, and cases cited therein. See also *Cusack* v. *Howlett* (1969), 44 Ill. 2d 233, 236.) Furthermore, a taxpayer may bring suit to enjoin the misuse of public funds in administering an illegal legislative act even though the taxpayer is not subject to the provisions of that act. (*Mansfield* v. *Carpentier* (1955), 6 Ill. 2d 455, 460-61; *Bode* v. *Barrett* (1952), 412 Ill. 204, 233-34; *Krebs* v. *Thompson* (1944), 387 Ill. 471, 474.) The case of *Droste* v. *Kerner* (1966), 34 Ill. 2d 495, cited by the State for the proposition that the taxpayers have no standing to sue because the public funds allegedly disbursed illegally were *de minimis,* was a consolidated appeal from two actions: one attacking a legislative enactment conveying State lands brought under the Public Monies Act; another attacking the same enactment on a theory of public trust. The court found that the Public Monies Act did not give the plaintiffs standing to maintain the first action, for conveyance of public lands was not the improper "disbursement" of public "funds" contemplated by the Act. In the second action, under the public trust doctrine, the plaintiff alleged that certain State funds would be expended for land surveys, title reports and the like to carry out the protested act. The court viewed these allegations as "no more than speculative conclusions" and then determined that "in any event, the expenditures which plaintiff alleges are *de minimis* for purposes of standing to sue as a taxpayer." (*Droste* v. *Kerner* (1966), 34 Ill. 2d 495, 505.) The court's statement regarding *de minimis* expenditures specifically referred to standing to sue under the public trust doctrine rather than under the Public Monies Act. Furthermore,

this aspect of *Droste* was overruled in *Paepcke* v. *Public Building Com.* (1970), 46 Ill. 2d 330, 341. *Droste* is clearly irrelevant to the issue of standing in the case at hand. Other cases which the State cites to demonstrate that the Public Monies Act is an inappropriate vehicle for this suit are not on point. *Daly* v. *County of Madison* (1941), 378 Ill. 357, 361, brought by taxpayers to enjoin an election, was characterized by the court as an action involving a political question which the courts of equity have no power to resolve. The case of *People ex rel. Morse* v. *Chambliss* (1948), 399 Ill. 151, was not brought under the Public Monies Act. The plaintiff taxpayer there sued the property owner to enforce a tax lien of about $13,500 against defendant's property, which lien he claimed to have arisen as a result of taxing officials' unauthorized acceptance of $14,500 as full satisfaction for back taxes of $28,000. The court in *Chambliss* observed that "[t]here can be no question but that the suit is for the collection of taxes alleged to be due and owing" (399 Ill. 151, 153), that the taxing body must direct the bringing of such suit, and that an individual taxpayer has no right to bring suit for the collection of taxes. The case *sub judice* is clearly distinguishable. It is designed to prevent the continued acceptance of an allegedly unlawful tax in lieu of all other taxes, when the appropriate taxing authorities have declined, and still decline, to follow applicable statutory procedures requiring them to assess all of Gulf's property in the same manner as other railroad properties assessed.

The State asserts that administrative review is the appropriate method for determining the correctness of a vehicle because it was not intended to enlarge the rights of citizens or extend the established jurisdiction of a court of

equity. (*Daly* v. *County of Madison* (1941), 378 Ill. 357, 376.) *Owens-Illinois Glass Co.* v. *McKibbin* (1943), 385 Ill. 245, 256-57, reviewed the decisions of this court regarding injunctive relief in tax matters and acknowledged the firmly established principle that "equity has jurisdiction to enjoin the collection of an unauthorized tax, although there exists a concurrent remedy at law." This principle continues to be viable (see *Sta-Ru Corp.* v. *Mahin* (1976), 64 Ill. 2d 330, 334; *Illinois Bell Telephone Co.* v. *Allphin* (1975), 60 Ill. 2d 350, 359-61) despite a modification to that rule created in *Illinois Bell.* In *Illinois Bell* (60 Ill. 2d 350, 359), this court held that the above proposition from *Owens* was no longer applicable where an administrative remedy was available under the Administrative Review Act. The State, for the first time on appeal, asserts that prior to bringing this suit the plaintiffs failed to invoke correct administrative remedies (presumably administrative review of defendant Kirk's assessment, or lack thereof, on the charter property). Since this argument was presented for the first time on appeal, it is deemed waived, and the rule of *Illinois Bell* is thus inapplicable. We conclude that this action is one traditionally entertained by courts of equity. We do not, therefore, address the applicability of the *Owens* rule in an action seeking an injunction under the Public Monies Act where administrative remedies are allegedly available. For the reasons above, we hold that plaintiff had standing and may properly maintain this action under the Public Monies Act.

It is the position of both Gulf and the State that the imposition of the charter tax in the years 1972 to 1975 was lawful, but their rationales differ. Gulf claims that all of IC's rights and obligations, including the charter tax and exemption from other taxes, were transferred to Gulf

under the "plenary power" of the Commission to effectuate such transfer. The State argues that the charter constitutes a contract between IC and the State; that it was beyond the power of the Commission, by approving the plan of reorganization, to transfer the charter properties, rights, and obligations to Gulf in abrogation of the charter contract; and that, therefore, IC has not been dissolved and the charter tax is still due and owing from it.

Plaintiff Snow maintains that the tax rights and obligations derived under the charter were personal to IC and were nontransferable without the consent of the Illinois General Assembly; that the language of the charter itself anticipates and authorizes the sale of the IC charter property; that the charter itself expressly cuts off the right to IC's tax exemptions when the charter property is sold to third persons; that the Commission's approval of the Plan did not purport to transfer IC's charter tax rights and immunities to Gulf; that the Commission's power extends to all acts necessary to effectuate the Plan (including the sale of all IC assets to Gulf) but its power does not extend to matters of taxation exclusively reserved to the States; and that the effect of the approved sale of all IC's property to Gulf was the dissolution of IC by operation of law.

The history of IC's organization is well recorded in the judicial opinions of this State. Most of the land was provided to the IC by land grant from the Federal government through the State.

> "The Congress of the United States • • • in 1850 passed an act granting to the State of Illinois a right of way through the public lands and the ownership of every alternate section of land for more than six miles in width on each side thereof, to aid the

State in constructing the railroad finally built by [IC]." (*People* v. *Illinois Central R.R. Co.* (1916), 273 Ill. 220, 234.)

"The act provided that the lands granted should be subject to the disposal of the legislature of Illinois and be applied to the construction of the said road and branches, and to no other purpose. * * * By section 15 of the charter appellee was granted all the lands ceded to the State by the act of Congress of 1850; also depot grounds in the city of Cairo, the right of way and all the improvements made thereon by the Internal Improvement Commission and the Great Western Railway Company under the acts of 1837. This latter property was in addition to that ceded to the State by the act of Congress of 1850." (*State* v. *Illinois Central R.R. Co.* (1910), 246 Ill. 188, 197-98.)

"When this charter was granted, the privilege or franchise to build this railroad was not considered of any special value. In the fifteen years, more or less, previous to the granting of this charter the public authorities had made several attempts to build a railroad similar to the one that was finally constructed by appellant company, and in one act the State had appropriated three and a half million dollars for that purpose. * * * The year this charter was granted, Gov. French, then chief executive of the State, said: 'The constitution having wisely debarred the State from again involving its credit in wild and visionary schemes of internal improvement, their chance of success rests upon individual skill, capital and enterprise.' " *People* v. *Illinois Central R.R. Co.* (1916), 273 Ill. 220, 234-35.

The land then granted to IC by the charter was largely "undeveloped and its ultimate value entirely problematical." *People* v. *Illinois Central R.R. Co.* (1916), 273 Ill. 220, 235.

"In passing the Land Grant Act, granting to the State the alternate sections of land afterward received by

appellant company from the State, Senator Stephen A. Douglas in the United States senate said: '* * * These lands have been in the market from fifteen to thirty years. The average time is about twenty-three years. But they will not sell at the usual price of $1.25 per acre because they are distant from any navigable stream or a market for produce. * * *' " *People* v. *Illinois Central R.R. Co.* (1916), 273 Ill. 220, 234.

Likewise, the contractual nature of the charter and the 7% charter tax imposed on IC therein are firmly established. (*State* v. *Illinois Central R.R. Co.* (1910), 246 Ill. 188, 205-07, and cases cited therein.) Sections 18 and 22 of the charter, authorizing the charter tax, are set out in full in *People* v. *Illinois Central R.R. Co.* (1916), 273 Ill. 220, 224-25. Section 22 provided:

"Sec. 22. The lands selected under said act of congress, and hereby authorized to be conveyed, *shall be exempt from all taxation under the laws of this state, until sold and conveyed* by said corporation or trustees, and the other stock, property and effects of said company shall be in like manner exempt from taxation for the term of six years from the passage of this act." (Emphasis added.) 1851 Private Laws of Illinois 72.

Plaintiff Snow asserts that the above section of the charter contemplates the sale of the charter line and that the tax exemptions indicated therein are effective only until the property is sold and conveyed. He also asserts the transaction between IC and Gulf constituted such sale and conveyance of IC properties, which sale to Gulf cut off the tax exemption and did not effect a transfer to Gulf of the right and obligation to pay the charter tax in lieu of other taxes. The State, on the other hand, asserts that the above charter section contemplated only the sale of non-right-of-way properties to raise funds from time to time. Such

properties would lose their tax-exempt status upon transfer to a third party. This section does not, it is asserted, speak to the sale of the railroad as an entity and, consequently, does not speak to the question of charter rights and obligations in the hands of a purchaser of the railroad as an entity. Both the State and Gulf urge, in this regard, that the intent of the charter may be gleaned by referring to the subsequent actions of the legislature in 1885 (Ill. Rev. Stat. 1975, ch. 114, par. 165), and in 1933 (Ill. Rev. Stat. 1975, ch. 32, par. 157.160). The former act provides, in terms virtually identical to those used in the latter, that nothing in the act "shall be so construed as to authorize or permit the Illinois Central Railroad Company to sell the railway constructed under its charter, * * * except subject to the rights of the state under its contrac with said company, * * * under the provisions of said charter." The State urges that the intent to disallow unilateral abrogation of the charter terms is evident in these enactments. Gulf, on the other hand, argues that these enactments support its proposition that the charter permitted the sale of the IC charter property, subject only to the buyers assuming the IC's obligations to the State under the charter.

The circuit court concluded (as was suggested by Snow) that section 22 of the charter contemplated a sale or conveyance of the railroad as an entity. This interpretation is erroneous. The cited portion of section 22 refers to two broad classes of properties: those "*lands* * * * hereby authorized to be conveyed," and the "*other stock, property,* and *effects* of said company." (Emphasis added.) We believe the phrase "lands * * * hereby authorized to be conveyed" necessarily refers to the land adjacent to and along the railroad right-of-way, the sale of which was

specifically provided for by section 16 of the charter. (1851 Private Laws of Illinois 70.) That the sale of less than all of the railroad property was authorized by the charter terms is implicit in the use in section 22 of the specific term "lands" rather than the more general term "properties." Furthermore, immediately after the reference to "lands * * * authorized to be conveyed," the charter deals with "*other* stock, property, and effects * * *." (Emphasis added.) Although we are unable to conclude that these provisions authorize the sale of the railroad as an entity, we are likewise unable to infer from these and other charter terms that the IC was forbidden to make such a sale. No language in the charter may be fairly interpreted to prohibit such sale, and we decline the State's invitation to construe the acts of the legislature, 34 years or more after the charter's acceptance by IC and enactment by the General Assembly, to imply such a term in the contract between IC and the State.

The State nevertheless asserts that, where a corporation such as a railroad has been granted a charter franchise intended to be exercised "for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy." (*Thomas* v. *West Jersey R.R. Co.* (1879), 101 U.S. 71, 83, 25 L. Ed. 950, 952.) By this and like citations, the State asserts that the unilateral acts of the IC, purporting to transfer all its assets, rights and obligations to Gulf without State consent, constitutes a forfeiture and rever-

sion of the railroad. It is also suggested, inferentially, that the State has a contractual interest, implied by law and because of public policy, in the continued existence of the charter, maintenance of the charter line by IC, and the right to collect the 7% charter tax from IC. We take no issue with the holding in *Thomas,* but we believe its effect is overriden to the extent necessary to effect a transaction approved by the Commission under 49 U.S.C. sec. 5 (1970). Section 5(11) provides:

> "[A]ny carrier * * * participating in * * * any transaction approved by the Commission [under section 5] * * * shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers * * * participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of * * * prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for * * *, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. * * * "

The power of the Commission to approve transactions under section 5 in derogation of State law, of course, ultimately derives from the powers of Congress under the supremacy clause of the United States Constitution (U.S. Const., art. VI), which provides that a constitutional act of Congress shall be the supreme law of the land, the laws of any State to the contrary notwithstanding, and from the interstate commerce clause (U.S. Const., art. I, sec. 8), which empowers Congress to regulate commerce among the several States. It has been long recognized, however,

that congressional power to occupy a field of law is not necessarily coextensive with its exercise of that power. *Willson* v. *Black Bird Creek Marsh Co.* (1829), 27 U.S. (2 Pet.) 245, 7 L. Ed. 412; *Cooley* v. *Board of Wardens* (1851), 53 U.S. (12 How.) 299, 13 L. Ed. 996.

It is, of course, clear that an agency of Congress has authority to act only within the scope of powers delegated to it by statute. Relevant to an understanding of the scope of the authority given the Commission under 49 U.S.C. sec. 5 is the brief history provided by the Supreme Court of the development and regulation of our nationwide system of railroads:

> "The basic railroad facilities of the United States were constructed under state authorization and restrictions by corporations whose powers and limitations were prescribed by state legislatures, or resulted from limitations on the states themselves. Construction in reference primarily to local or regional transportation needs created duplicating and competing falilities in some areas and provided inadequate ones in others. Expansion neressary to serve advancing national frontiers was stimulated by extensive subsidies from the Federal Government, largely in the form of land grants. But the stress and strain of World War I brought home to us that the railroads of the country did not function as a really national system of transportaion. Tha crisis also made plain the confusions, inefficiencies, inadequacies and dangers to our national defense and economy flowing from the patchwork railroad pattern that local interests under local law had created.

The demand for an integrated, efficient and coordinated system of rail transport, equal to the needs of

our national economy and defense, resulted in the Transportation Act of 1920. In a series of decisions on particular problems, this Court defined the general purposes of that Act ***. The tenor of all of these was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system. [Citations.]

As a means to this end, the 1920 Act required the Commission to prepare and adopt a plan for nationwide consolidations of the railway properties of the Country. ***

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The Transportation Act of 1940 relieved the Commission of formulating a nationwide plan of consolidations. Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice and reasonableness, in which case they should become effective regardless of state authority. *** This Court has recently and unanimously said in reference to this Act, 'Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind.' *Seaboard Air Line R. Co.* v. *Daniel,* 333 U.S. 118." *Schwabacher* v. *Unite dStates* (1948), 334 U.S. 182, 191-93, 92 L. Ed. 1305, 68 S. Ct. 958, 963-64.

The Commission's approval of a section 5 transaction is dependent upon, among other considerations, a finding that such transaction will be "consistent with the public interest." (*Schwabacher* v. *United States* (1948), 334 U.S. 182, 194, 92 L. Ed. 1305, 1313, 68 S. Ct. 958, 965.) In its opinion approving the subject transaction, the Commission pointed out at page 841:

> "The phrase 'consistent with the public interest,' as judicially construed, means compatible with, or not contradictory or hostile to the public interest. See *Pacific Power and Light Co.* v. *Federal Power Comm.*, 111 F. (2d) 1014, 1016. As was stated by the Supreme Court in *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25:
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> 'The term "public interest" *** has a direct relation to the adequacy of our transportation system, to its essential conditions of economy and efficiency and to appropriate provision and best use of transportation facilities.'" (Illinois Central Gulf R.R. Co.—Acquisition—Gulf, Mobile & Ohio R.R. Co., Illinois Central R.R. Co. *et al.* (1971), 338 I.C.C. 805, 841.)

The Commission, further, made a specific finding that the transaction was in the best interest of the public. (338 I.C.C. 805, 834.) We therefore believe that public policy was adequately served by the Commission's necessary finding that the transaction was in the public interest. Insofar as necessary to effect a section 5 transaction, section 5(11) suspends any charter term, express or implied, which would otherwise prevent the sale of IC. As the sale of all IC assets, including the substantial charter line properties, was the very foundation of the transaction approved by the Commission, such sale was clearly encompassed

within the section 5(11) protection from inhibiting State laws. *Seaboard Air Line R.R. Co.* v. *Daniel* (1948), 333 U.S. 118, 92 L. Ed. 580, 68 S. Ct. 426.

It has been observed that "[t]he law does not expressly dissolve the selling corporation, but it leaves it without stock, officers, property, or franchises. A corporation without shareholders, without officers to manage its business, without property with which to do business, and without the right lawfully to do business, is idssolved by the operation of the law which brings this condition into existence." (*Rochester R. Co.* v. *Rochester* (1907), 205 U.S. 236, 256, 51 L. Ed. 784, 792, 27 S. Ct. 469.) The State, nevertheless, further objects that the chancellor incorrectly ruled on the issue of IC's dissolution because that issue has never been presented to the court on proper pleadings where the parties are correctly aligned. (We point out in this regard that the State, though given notice and invitation to attend the Commission hearings on the subject plan of reorganization, declined to attend.) The circuit court afforded the State the opportunity to plead this issue and provided a 30-day continuance expressly for that purpose. The State did not so plead. We therefore hold that, under all these circumstances, the circuit court correctly ruled that the IC was dissolved.

Snow urges that, although approval of the Plan was sufficient to effect a sale of the IC properties to Gulf, such approval did not confer upon Gulf the IC's charter tax status. He maintains that these tax exemptions and obligations did not survive the sale and conveyance of the charter line properties to Gulf. Snow's argument is three-pronged. First, section 22 provides that the tax-exempt status of the charter property existed only until the charter property was sold and conveyed. Second, he argues that the

so-called Charter Immunity Cases (cited later) establish that tax exemptions created as to one corporation are personal to that corporation and are not part of the general franchises which may be transferred upon sale to another corporation. Instead, the new corporation becomes subject to the general tax laws existing at the time of its formation. Third, Snow poses that the Commission's approval did not have the effect of overriding the nontransferability of tax exemptions under State law because such override was not necessary to effect the section 5 transaction, and because the Commission did not purport to address the State taxation issue.

Snow's first argument fails because section 22 of the charter, as discussed above, cuts off the tax exemption of charter properties "hereby authorized to be conveyed." Section 22 does not deal with the sale of the charter line as an entity, or with the transfer or loss of the special tax status incident thereto. No other charter provision deals with the tax status of the charter properties in the hands of a third party. However, in the absence of a specific charter provision or a valid act of the General Assembly expressly providing therefor, we hold that the tax exemption and charter tax granted IC were personal to IC and could not pass on sale to Gulf. The body of law evolved in the 10 so-called Charter Immunity Cases amply supports this conclusion. *Yazoo & Mississippi Valley R.R. Co.* v. *City of Vicksburg* (1908), 209 U.S. 358, 52 L. Ed. 833, 28 S. Ct. 510; *Rochester Ry. Co.* v. *City of Rochester* (1907), 205 U.S. 236, 51 L. Ed. 784, 27 S. Ct. 469; *Yazoo &Mississippi Valley R.R. Co.* v. *Adams* (1901), 180 U.S. 1, 45 L. Ed. 395, 21 S. Ct. 240; *Chesapeake & Ohio Ry. Co.* v. *Miller* (1885), 114 U.S. 176, 29 L. Ed. 121, 5 S. Ct. 813; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Berry* (1885), 113

U.S. 465, 28 L. Ed. 1055, 5 S. Ct. 529; *Memphis & Little Rock R.R. Co.* v. *Berry* (1884), 112 U.S. 609, 28 L. Ed. 837, 5 S. Ct. 299; *Louisville & Nashville R.R. Co.* v. *Palmes* (1883), 109 U.S. 244, 27 L. Ed. 922, 3 S. Ct. 193; *Wilson* v. *Gaines* (1881), 103 U.S. 417, 26 L. Ed. 401; *Atlantic & Gulf R.R. Co.* v. *Georgia* (1879), 98 U.S. 359, 25 L. Ed. 185; *Morgan* v. *Louisiana* (1876), 93 U.S. 217, 23 L. Ed. 860. See *Cincinnati, Indianapolis & Western R.R. Co.* v. *Barrett* (1950), 406 Ill. 499, 504-05.

Did the Commission's approval of the sale of the IC's property to Gulf effect a transfer to Gulf of IC's charter tax status which otherwise ended under the Charter Immunity Cases? It is Gulf's thesis that the Commission's approval of a plan of reorganization operates, under section 5(11), to suspend the effect of State tax law. Gulf's reading of section 5(11) emphasizes reference to the "plenary powers" of the Commission, but Gulf ignores the effect of the express limitation of that section to suspensions of State law only "insofar as may be necessary to enable them to carry into effect the transaction so approved ***." 49 U.S.C. sec. 5(11) (1970).

As discussed above, Congress' power to fully occupy a field of law is not necessarily coextensive with the exercise of that power. On the other hand, matters of State taxation are reserved to the States under the tenth amendment to the Constitution. (See *Thomson* v. *Union Pacific R.R. Co.* (1870), 76 (9 Wall.) U.S. 579, 591, 19 L. Ed. 792.) The power of the State legislature to levy and collect taxes is unrestricted where such tax is not otherwise unconstitutional. (*People ex rel. Schuler* v. *Chapman* (1939), 370 Ill. 430, 437; see also *State* v. *Illinois Central R.R. Co.* (1910), 246 Ill. 188, 206). When the United States Constitution has granted the Federal government plenary jurisdiction in a certain field, and an act of Congress within that field impinges upon an area traditionally reserved to the States (taxation, in this instance), a rule of constrution has grown up to shelter this delicate area of State's rights. This rule affirms that "Congress may circumscribe its regulation and occupy a limited field" and prescribes that "the intention to supersede the exercise by the state of its authority as to matters not covered by the Federal legislation is not to be implied unless the act of Congress fairly interpreted is in conflict with the law of the state." *Atchison, Topeka & Santa Fe Ry. Co.* v. *Railroad Com.* (1930), 283 U.S. 380, 392-93, 75 L. Ed. 1128, 1137, 51 S. Ct. 553, 556.

Section 5(11) of the Act reveals congressional intention to abrogate State law in section 5 transactions no further than necessary to effect than transaction. It is our opinion that a fair reading of that act does not reveal a congressional intent to supersede State law in the matter of State taxation, where the otherwise applicable State tax imposes no unconstitutional burden upon interstate commerce. As the authority of an agency of Congress extends no further than the act conferring that authority, it is our opinion that the Commission's approval of the Plan did not operate to extend the otherwise invalid charter tax and concurrent exemptions to Gulf.

This conclusion is further based on the fact that the Commission did not address, much less attempt to adjudicate, the question of such charter tax exemptions in its detailed, 76-page opinion approving the transfer. The Plan itself nowhere makes any explicit reference to the charter tax obligations of IC or of their transfer to Gulf. Only in exhibit C to the Plan, entitled "Indenture Sale, Assignment and Transfer," is any reference whatsoever made to IC's charter tax obligations. Paragraph 3(e) thereto provides that Gulf "assumes all contracts, obligations or liabilities ***

and agrees that any lien of the State *** upon, or right to tax, the charter line property *** in accordance with the provisions of the charter ***, approved February 10, 1851, shall not be released, suspended, modified, altered, remitted or in any manner diminished or impaired as against [Gulf] but the same, as applicable to the charter line property *** shall be and remain *** binding upon [Gulf].'' This provision appears to reffect IC's desire and Gulf's assent that IC be held harmless by Gulf for any charter taxes thereafter imposed upon IC by the State. Further, no express reference to the charter tax exemptions is made anywhere in the Plan, the exhibits, or the opinion of the Commission.

Fairly considered, the Commission's approval of the plan of reorganization, which plan contained no reference to IC's special tax exemption and referred to IC's tax status only obliquely in an exhibit thereto, cannot be deemed to authorize the transfer to Gulf of IC's charter tax obligations or immunities, in the absence of some express reference to the contrary in the Commission's opinion. No such reference here exists. We hold that IC's special tax obligation and immunities did not pass to Gulf under the terms of IC's charter, or by enabling legislation, or by virtue of the Commission's approval of the reorganization. It follows that the taxes generally applicable to railroads in this State were applicable to Gulf commencing August 10, 1972.

It remains for this court to determine whether these generally applicable State taxes can and should be applied retroactively upon Gulf. Gulf maintains that the taxes may be assessed and collected only pursuant to statute, and that there is no statutory scheme which permits such retroactive application; that reassessment may be accomplished only by way of administrative review prior to finalization of the assessments, and once these have been

certified to the county clerk by the Department of Local Government Affairs there can be no reassessment. The tax action which the chancellor ordered the Department of Local Government Affairs to take herein is erroneously characterized by Gulf as a ''reassessment.'' Such characterization is based upon the following: section 80 of the Revenue Act of 1939 (Ill. Rev. Stat. 1975, ch. 120, par. 561) provides that all real estate property be assessed as a unitffi Gulf's charter line property must necessarily be included in any such unit; there is no statutory authority for assessing the charter line separately; and, therefore, the Gulf property was fully assessed for the years in question (albeit, Gulf concedes, ''perhaps erroneously''). As applied to the charter line property, historically treated as a separate tax entity, this argument clearly elevates form over substance. Sections 79 through 90 of the Revenue Act of 1939 (Ill. Rev. Stat. 1975, ch. 120, pars. 560-571) provide ample direction, and section 220 (Ill. Rev. Stat. 1975, ch. 120, par. 701) provides the Department ample authority to access the charter property for years past. We note, parenthetically, that defendant Kirk, who is charged with the duties of this assessment, does not deny the assessment can be carried out under his statutory authority, nor that such duty would be unduly burdensome.

The circuit court's judgment order provided that, effective August 10, 1972, ''the Director of the Department of Local Government Affairs shall assess the Charter Property in the same manner as he assesses the property of other railroads in the State and he shall transmit the lists and information to the various proper taxing authorities of the Illinois counties *in which Charter Property is located.*'' (Emphasis added.) Section 86 of the Revenue Act of 1939 (Ill. Rev. Stat. 1971, ch. 120, par. 567) contemplates (with minor variations) that the equalized assessed value of the

railroad properties subject to assessment shall be listed and taxed in the several taxing districts in the proportion that the length of track within the taxing district bears to the total length of track owned or used in the State. Thus, the circuit court was in error in its concluding phrase, "in which Charter Property is located," for this phrase has the effect of directing the transmission of such assessment lists only to the taxing districts in which the charter line is located.

By the order of the circuit court, Gulf was responsible for property taxes as of August 10, 1972. One of the attorneys for the plaintiffs pointed out at oral argument that section 81 of the Revenue Act of 1939 (Ill. Rev. Stat. 1971, ch. 120, par. 562) requires new railroad companies to file their schedules "pertaining to real property in January, and pertaining to personal property on April 1 next after the location of their road." We interpret this to mean that filling was required by January and April 1973, respectively, and therefore conclude that the trial court erred in requiring Gulf, a new corporation, to be responsible for the period from August 10, 1972, through December 31, 1972.

As stated above, there is adequate statutory authority to hold Gulf legally subject to retrospective taxation for the years 1973 to 1975. Separate considerations govern whether, for equitable reasons, Gulf should be required to make such payments in addition to the 7% gross receipt tax concededly paid for 1973, 1974 and 1975. Because there was no express charter authorization for the transfer of IC's charter tax status to Gulf, and because the law of the Charter Immunity Cases holds such attempted transfers invalid in the absence of express legislation, Snow argues that Gulf knew or should have known that such tax

status could not be transferred to it by IC. He further urges that the judgment makes no change in existing law, unlike cases where this court has provided only prospective application. Gulf, to the contrary, asks not to be subjected to "double taxation" by the retrospective application of this judgment. We believe the circumstances of this case require us to fashion a judgment which does not impose an inequitable tax burden upon Gulf. The limited effect of the Commission's approval upon IC's charter tax status was not clearly foreshadowed in view of the constitutional powers of Congress to regulate commerce between the States and the powers to suspend State law bestowed upon the Commission in section 5(11). Moreover, Gulf could reasonably have taken various acts of the State legislature, subsequent to the charter, to indicate that the State would attempt to hold Gulf responsible for he payment of the charter tax. Gulf could likewise reasonably have expected the State to view the charter tax as the fair equivalent of other taxes, and could reasonably have expected the State to take the posture that the State did ultimately take—to accept the charter taxes in lieu of all other taxes. Based on the foregoing, we determine that partial retrospective application is appropriate. The trial court's judgment order is modified to provide that if any additional tax is found to be due and owing from Gulf for any one of the years 1973, 1974, and 1975, such tax shall be limited to an amount that exceeds the charter tax already paid to the State for that year.

The judgment of the circuit court is hereby affirmed as modified, and the cause is remanded for further proceedings consistent with the views expressed herein.

Affirmed as modified;
cause remanded.

CLARK and DOOLEY, JJ., took no part in the consideration or decision of this case.

APPENDIX B

JUDGMENT ORDER OF THE CIRCUIT COURT OF COOK COUNTY

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT — CHANCERY DIVISION

ROBERT H. SNOW, individually and on behalf of all other taxpayers similarly situated, Plaintiff, vs. ALAN J. DIXON, State Treasurer of Illinois, GEORGE W. LINDBERG, Comptroller of State of Illinois, ROBERT H. ALLPHIN, Director of the Department of Revenue of Illinois, and FRANK A. KIRK, Director of the Department of Local Government Affairs of Illinois, and ILLINOIS CENTRAL GULF RAILROAD CO., a Delaware corporation, Defendants.	No. 73 CH 2723

JUDGMENT

This cause coming on to be heard upon motion for summary judgment of plaintiff ROBERT H. SNOW ("Snow"), the motion for summary judgment of defendant Illinois Central Gulf Railroad Co. ("Gulf"), and the motion for summary judgment of Alan J. Dixon ("Dixon"), State Treasurer of Illinois, George W. Lindberg ("Lindberg"), Comptroller of the State of Illinois, Robert H. Allphin ("Allphin"), Director of the Department of Revenue of

Illinois, and Frank A. Kirk ("Kirk"), Director of the Department of Local Government Affairs of Illinois (Dixon, Lindberg, Allphin and Kirk being hereinafter sometimes referred to collectively as the "State Defendants"), and certain stipulations of fact submitted by the parties herein; and the Court having examined the pleadings, certain stipulations of fact, certain interrogatories and their answers, certain stipulated depositions, and the memoranda of law filed herein, having heard the arguments and representations of counsel, and being otherwise fully advised in the premises:

THE COURT DOES HEREBY FIND:

1. Snow has been, and now is, a citizen of the State of Illinois, a resident of the City of Chicago, County of Cook, State of Illinois, and is a taxpayer, both in and to the County of Cook and the State of Illinois; that this lawsuit is properly brought as a taxpayer's suit under "an Act in relation to suits to restrain and enjoin the disbursement of public monies by officers of the State", (Ill. Rev. Stats.; 1973 Ch. 102, § 11 *et seq.*) that Snow's claims are typical of the claims of said taxpayers; and that Snow and his counsel will fairly and adequately protect the interests of the taxpayers of the State of Illinois.

2. That by private law in force February 10, 1851, the Illinois General Assembly enacted "An Act to Incorporate the Illinois Central Railroad Company" (the "Private Law"), certain portions of which Private Law provide as follows:

(a) Section 1 of said Private Law provides as follows:

"Whereas, in the judgment of this general assembly, the object of incorporating the Central Railroad Company cannot be attained under general laws; therefore, Section 1, Be it enacted by the people of the State of

Illinois, represented in the General Assembly, That Robert Schuyler, George Griswold, Gouverneur Morris, Franklin Haven, David A. Neal, Robert Rantoul, junior, Jonathan Sturgis, George W. Ludlow, John F. A. Sanford, Henry Grinnell, William H. Aspinwall, Leroy Wiley, and Joseph W. Alsop, and all such persons as shall hereafter become stockholders in the company hereby incorporated, shall be a body politic and corporate, by the name and style of the "Illinois Central Railroad company," and under that name and style shall be capable of suing and being sued, impleading and being impleaded, defending and being defended against, in law and equity, in all courts and places whatsoever, in like manner and as fully as natural persons; may make and use a common seal, and alter or renew the same at pleasure; and by their said corporate name and style, shall be capable, in law, of contracting and being contracted with, shall be and are hereby invested with the powers, privileges, immunities and franchises, and of acquiring, by purchase or otherwise, and of holding and conveying, real and personal estate which may be needful to carry into effect, fully the purposes and objects of this act."

3. That certain sections, as amended, of the aforesaid Private Law appear in Illinois Revised Statutes, 1973 Ch. 120, as follows:

"ILLINOIS CENTRAL RAILROAD"

Act of Feb. 10, 1851, R. S. 1847, p. 909

373. Five percent of income.] § 18. In consideration of the grants, privileges and franchises herein conferred upon said company for the purposes aforesaid, the said company shall, on the first Mondays of December and June in each year, pay to the Department of Revenue of the State of Illinois five per centum on the gross or total proceeds, receipts or income deprived from said road and branches, for the six months then next preceding. The first payment of such percentage on the main trunk of said road to

commence four years from the date of said deed of trust, and on the branches, six years from the date aforesaid, unless said road and branches are sooner completed, then from the date of completion. And for the purpose of ascertaining the proceeds, receipts or income aforesaid, an accurate account shall be kept by said company, a copy whereof shall be furnished to the Governor of the State of Illinois and to the Department of Revenue; the truth of which account shall be verified by the affidavits of the treasurer and secretary of such company. And for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the Governor of the State of Illinois, the Director of the Department of Revenue, or any other person by law appointed, to examine the books and papers of said corporation, and to examine, under oath, the officers, agents, and employees of said company, and other persons. And if any person so examined by the Governor or other authority, shall knowingly and wilfully swear falsely, or if the other officers making such affidavits shall knowingly and wilfully swear falsely, every such person shall be subject to the pains and penalties of perjury.

374. Land taxable when conveyed—Application of tax, etc.] § 22. The lands selected under the act of congress entitled "An Act granting the right of way, and making a grant of land to the states of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile", passed September 20, 1850, and authorized by this Act to be conveyed shall be exempt from all taxation under the laws of this state, until sold and conveyed by the Illinois Central Railroad Company or the trustees designated in this Act. The stock, property and assets belonging to the company shall be listed by the president, secretary or other officer, with the Department of Revenue and an annual tax for state purposes shall be assessed, upon all the property and assets of every name, kind and description belonging to that company. Whenever the taxes levied for state purposes shall exceed ¾ of

1% per year, such excess shall be deducted from the gross proceeds or income required to be paid by the company to the state, and the company is hereby exempted from all taxation of every kind, except as herein provided for. The revenue arising from such taxation, and the 5% of gross or total proceeds, receipts or income aforesaid, shall be paid to the Department of Revenue and covered into the general revenue fund in the state treasury and applied to the payment of interest-paying state indebtedness until the extinction thereof. In case the 5% provided to be paid into the state treasury and the state taxes to be paid by the corporation do not amount to 7% of the gross or total proceeds, receipts or income, however, then the company shall pay the difference, so as to make the whole amount paid equal, at least to 7% of the gross receipts of the company."

4. That certain lands were thereafter conveyed to the Illinois Central Railroad Company ("IC") pursuant to the Private Law, and other ancillary lands having been acquired by IC, all of which lands are hereinafter referred to as the Charter Property, and pursuant to the Private Law, IC began to pay, with respect to the Charter Property the special tax described in §§ 18 and 22 of the Private Law, such special tax being hereinafter referred to as the Charter Property Tax, and also pursuant to the Private Law, IC with respect to the Charter Property only, became and was exempt from all state and local taxation other than the Charter Property Tax.

5. That a Plan of Reorganization was approved by the Interstate Commerce Commission whereby Illinois Central Gulf Railroad Company ("Gulf") acquired the assets of Illinois Central Railroad Company ("IC") and Gulf, Mobile & Ohio Railroad Company ("GM&O") and Illinois Central Railroad Company was to be dissolved. This Plan

became effective on August 10, 1972 and under said Plan IC sold and conveyed all of its assets, including the Charter Property, to Gulf.

6. That the parties have stipulated that the discovery deposition of Harold J. Weldrake ("Weldrake"), an employee of Allphin's, heretofore taken in this cause, as corrected by said deponent, may be used in lieu of calling Weldrake as a witness and that at pp. 6, 17-18, 23 of his deposition Weldrake (whose testimony is not contradicted by any other evidence) stated that at the time of the taking of his deposition the Illinois Department of Revenue employed three full-time auditors (one permanently assigned and two in training), whose aggregate annual salary was $41,400.00, to verify and ascertain the accuracy of the accounts and returns submitted in connection with the Charter Property and the Charter Property Tax.

7. That Snow submitted certain interrogatories to the State Defendants and that in their answer to Interrogatory 11, the State Defendants state that in relation to the assessment and collection of the Charter Property Tax, for the period between 1968 and May 1, 1975, there are literally hundreds of employees of the State of Illinois who had as some portion of their responsibilities, duties relating to any or all of the following:

(a) Verification of the accuracy of the list of stock, property and assets submitted;

(b) Recording of the list of stock, property and assets submitted;

(c) Establishing the valuation of the items contained on the list of stock, property and assets;

(d) Establishing the tax rate to be applied;

(e) Establishing the tax to be assessed against each such item on the list of stock, property and assets;

(f) Receiving or processing in any way tax payments;

(g) Verifying or ascertaining whether the total tax paid amounts to seven percent of the gross or total proceeds, receipts or income, or issuing deficiency notices, where applicable; or

(h) Secretarial or clerical duties in connection with the duties or responsibilities above described or in relation or in connection with any duty or responsibility relating in any way to the procedures set forth in Section 374 of the Illinois Revised Stats., 1973, Chapter 120.

8. That unless enjoined and restrained, the State Defendants, or some of them, as to Gulf, will continue to collect and to enforce the collection of the Charter Property Tax, and will continue to spend public funds of the State of Illinois in connection with the enforcement and collection of the Charter Property Tax.

9. That since August 10, 1972, Gulf, and not IC, has been filing Charter Property Tax accounts and returns, and has been paying the Charter Property Tax on the Charter Property.

10. That under the Plan of Reorganization, the Charter Property Tax did not become an objection of Gulf, and Gulf did not acquire IC's exemption from all other taxation as described in said Section 22 of the 1851 Charter.

11. That effective as of August 10, 1972, the Director of the Department of Local Governmental Affairs should assess the Charter Property in the same manner as he assessed the property of other railroads in the State and transmit the lists and information to the various proper taxing authorities of the Illinois counties in which Charter Property is located.

12. That trusts should be declared by this Court for all tax moneys heretofore paid by Gulf on the Charter

Property which have not been paid into the general state treasury and for all future sums of money paid by Gulf, subsequent to the date of this judgment, on account of taxes of any nature on or pertaining to the Charter Property, which moneys should be placed into segregated funds, at interest, pending the further order of this Court, and said funds not to be disbursed or commingled pending further order of this Court.

13. That Snow is without adequate remedy at law and is entitled to the injunctive relief described herein and that Snow's motion for summary judgment should be granted, and the motions for summary judgment of Gulf and of the State Defendants should be denied.

14. That the relief prayed for in paragraphs A and B of the prayer in the amended complaint is proper and should be granted to the extent hereinafter provided, that pursuant to Section 45(4) of the Civil Practice Act of Illinois, this judgment will terminate the litigation except for the matters reserved herein, and that there is no just reason for delaying the enforcement of this judgment or an appeal therefrom.

15. That the charter granted to IC was a binding contract between the State of Illinois and IC.

IT IS THEREFORE ORDERED, DECLARED, ADJUDGED AND DECREED AS FOLLOWS:

A. The motions for summary judgment of Gulf and the State Departments are denied, the motion for summary judgment of Snow is granted, and judgment is entered in favor of Snow and against the defendants.

B. The Charter Property Tax did not become an obligation of Gulf and the exemptions from state and local taxation granted to IC and the Charter Property under the

1851 law were not as a matter of law conveyed to or acquired by Gulf pursuant to the Plan of Reorganization; and IC's sale and conveyance of the Charter Property to Gulf, pursuant to said Plan, was a sale and conveyance of the Charter Property within the meaning of Section 22 of the 1851 law, so that effective August 10, 1972, the Charter Property lost its exemption from all applicable state and local taxation from which it previously was exempt.

C. Effective as of August 10, 1972, the Director of the Department of Local Government Affairs shall assess the Charter Property in the same manner as he assesses the property of other railroads in the State and he shall transmit the lists and information to the various proper taxing authorities of the Illinois counties in which Charter Property is located.

D. Pursuant to said Plan of Reorganization and approval thereof by the Interstate Commerce Commission, IC has been duly dissolved.

E. The State Defendants are permanently enjoined and restrained from continuing to collect or from expending public funds of the State of Illinois in connection with the enforcement and collection of the Charter Property Tax from Gulf, and such a permanent writ of injunction is ordered to be issued forthwith, by the Clerk and under the Seal of this Court.

F. Trusts are hereby declared for all tax moneys heretofore paid by Gulf on account of the Charter Property Tax which have not been paid into the general revenue fund of the State Treasury and for all future sums of money paid by Gulf, subsequent to the date of this judgment, on account of taxes of any nature on or pertaining to the Charter Property and the Court retains jurisdiction thereof.

G. With respect to all moneys heretofore paid by Gulf on account of the Charter Property Tax which have not been paid into the general State Treasury and for all future moneys which Gulf may pay on account of the Charter Property Tax subsequent to this judgment, pending the further order of this Court, Allphin, or his successor, and Dixon, or his successor, are ordered to place all such sums of money into a segregated protest fund, at interest, said fund not to be disbursed or commingled, pending the further order of this Court, and a permanent writ of injunction is ordered to be issued forthwith, by the Clerk and under the Seal of this Court.

H. With respect to all moneys paid by Gulf, subsequent to this judgment, on account of state taxes of any nature (other than the Charter Property Tax) on or pertaining to the Charter Property, pending the further order of this Court, the State Defendants are ordered to place all such sums of money into one or more segregated funds, at interest, said funds or funds not to be disbursed or commingled, pending the further order of this Court, and a permanent writ of injunction is ordered to be issued forthwith, by the Clerk and under the Seal of this Court.

I. With respect to all sums of money hereinafter paid by Gulf to the Cook County Collector on behalf of Cook County taxing bodies, subsequent to the date of this judgment, on account of all back taxes (if any) resulting from assessments (if any) for the period between August 10, 1972 and the date of this judgment (including but not limited to personal property taxes and real estate taxes), on or pertaining to the Charter Property, such tax moneys shall be held by defendant Edward J. Rosewell, Cook County Collector ("Rosewell"), or his successors, in one or more segregated interest bearing accounts, until the further order of this Court.

J. With respect to all sums of money when paid by Gulf on account of all future taxes due for assessments made for the first full taxable year after the date of this judgment (including but not limited to personal property taxes and real estate taxes) on or pertaining to the Charter Property, payable to the Cook County Collector on behalf of Cook County taxing bodies, such moneys shall be deemed to have been paid under protest in accordance with the statutes pertaining to the payment of taxes under protest, and one third of such tax moneys when paid shall be held by Rosewell, or his successors, in one or more segregated interest bearing accounts until the further order of this Court. The remaining two thirds shall be distributed to the taxing bodies so entitled.

K. Without limiting the finality of this judgment, the Court retains jurisdiction of this cause for the purpose of entering appropriate orders with respect to the award of plaintiff's costs and counsel fees, and the enforcement of this judgment.

L. This cause is continued generally, to be called for hearing upon five days' notice from any party in the event that defendants do not perfect an appeal within the time permitted by law or following a final determination of any appeal.

Dated this 17th day of May, 1976.

ENTER:
DONALD J. O'BRIEN,
Judge.

NEISTEIN, RICHMAN, HAUSLINGER
& YOUNG, Ltd.

Attorneys for Plaintiff
33 N. La Salle Street
Chicago, Illinois 60602
782-2555

APPENDIX C

DECISION OF THE INTERSTATE COMMERCE COMMISSION, 338 I.C.C. 805, 879-880 (1971).

STATUTORY FINDINGS

Subject to the terms, conditions, and modifications hereinbefore discussed, which we find to be just and reasonable, we find that (1) the acquisition by Illinois Central Gulf Railroad Company of the properties, franchises, and operating authorities of Gulf, Mobile and Ohio Railroad Company, including motor carrier operating rights held by Illinois Central Railroad Company; (2) the acquisition by Illinois Central Gulf Railroad Company of sole or joint control of carriers subject to the Interstate Commerce Act subsidiary to, or affiliated with Gulf, Mobile and Ohio Railroad Company and/or Illinois Central Railroad Company through ownership of stock or lease, including trackage rights over, or joint use of, railroad lines of certain carriers; (3) the amendment to the lease of the properties of the New Orleans Great Northern Railway Company dated July 1, 1933, as supplemented as of September 4, 1940, under which the Illinois Central Gulf Railroad Company will operate the properties of the New Orleans Great Northern Railway Company; (4) the acquisition by Illinois Central Industries, Inc., of sole control of Illinois Central Gulf Railroad Company by way of (a) sale, assignment, and transfer of the properties of Gulf, Mobile and Ohio Railroad Company to Illinois Central Gulf Railroad Company, (b) the merger of Gulf, Mobile and Ohio Railroad Company into Illinois Central Industries, Inc., (c) the sale, assignment, and transfer of the properties of Illinois Central Railroad Company to Illinois Central Gulf Railroad Company, and the liquidation and dissolution of Illinois Central Railroad Company, are all transactions within the scope

of subparagraph (a) of section 5(2) of the act and will be consistent with the public interest; (5) the inclusion of Bonhomie & Hattiesburg Southern Railroad Company, the Fernwood, Columbia and Gulf Railroad Company, and the Columbus and Greenville Railway Company into the Illinois Central Gulf Railroad Company, as a prerequisite to our approval of the principal transactions herein, is upon equitable terms and is consistent with the public interest; (6) the issuance by Illinois Central Gulf Railroad Company of 1,000 shares of common stock, par value $1 per share, and the assumption by Illinois Central Gulf Railroad Company of the certain obligations of Central, Gulf, and Columbus and Greenville Railway Company are (a) for a lawful object within the corporate purposes of Illinois Central Gulf Railroad Company, and are compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the merged company of service to the public as a common carrier, and which will not impair the ability of the merged company to perform that service, and (b) are reasonably necessary and appropriate for such purposes; (7) Industries should be considered as a carrier under section 5(3) for the purpose of compliance with sections 20(5) and 20a to the extent previously indicated; that Industries motion to dismiss its application under section 20a in Finance Docket No. 25106 should be, and it is hereby, denied in view of our action herein, and that the proposed issuance of securities by Industries in connection with our authorization in Finance Docket Nos. 25103, 25104, and 25105, is consistent with the proper performance of its service to the public by each carrier which is under the control of such corporation; that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest; and that Industries will

continue to be considered a carrier under section 5(3) and subject to the provisions of sections 20(1) and (2) as aforesaid; and (8) that the increase in total fixed charges resulting from the merger and inclusion transactions will not be contrary to the public interest.

An appropriate order will be entered.

VICE CHAIRMAN HARDIN and COMMISSIONER BREWER did not participate.

ORDER OF
THE INTERSTATE COMMERCE COMMISSION,
338 I.C.C. 805, 940-1 (1971).

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, oral argument having been heard, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report and the report of the hearing examiner are referred to and made a part hereof:

It is ordered, That subject to the terms, conditions, and modifications referred to in our report, (1) the acquisition by Illinois Central Gulf Railroad Company of the properties, franchises and operating authorities of the Gulf, Mobile and Ohio Railroad Company and of the Illinois Central Railroad Company; (2) the acquisition by Illinois Central Gulf Railroad Company of sole or joint control of carriers subject to the Interstate Commerce Act subsidiary to, or affiliated with the Gulf, Mobile and Ohio Railroad Company

and/or the Illinois Central Railroad Company through ownership of stock or lease, including trackage rights over, or joint use of, railroad lines of certain carriers; (3) the amendment to lease of the properties of the New Orleans Great Northern Railway Company dated July 1, 1933, as supplemented as of September, 1940; (4) the acquisition by Illinois Central Industries, Inc., of sole control of Illinois Central Gulf Railroad Company by way of (a) the sale, assignment, and transfer of the properties of Gulf, Mobile and Ohio Railroad Company to Illinois Central Gulf Railroad Company, (b) the merger of the Gulf, Mobile and Ohio Railroad Company into Illinois Central Industries, Inc., and (c) the sale, assignment, and transfer of properties of the Illinois Central Railroad Company to the Illinois Central Gulf Railroad Company and the liquidation and dissolution of the Illinois Central Railroad Company; and (5) the inclusion of the Bonhomie & Hattiesburg Southern Railroad Company, the Fernwood, Columbia and Gulf Railroad Company, and the Columbus and Greenville Railway Company be, and they are hereby, approved and authorized.

It is further ordered, That the issuance by the Illinois Central Gulf Railroad Company of 1,000 shares of common stock, par value $1 per share, and the assumption by Illinois Central Gulf Railroad Company of the outstanding obligations of the Gulf, Mobile and Ohio Railroad Company, the Illinois Central Railroad Company and the Columbus and Greenville Railway Company and the issuance of certain securities by Illinois Central Industries, Inc., in connection with authorization herein and as proposed in F.D. No. 25106, be, and they are hereby, authorized.

It is further ordered, That except as herein authorized, the aforesaid stock shall not be sold, pledged, repledged,

or otherwise disposed of by the Illinois Central Gulf Railroad Company unless or until so ordered or approved by this Commission.

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said securities or dividends thereon on the part of the United States.

It is further ordered, That Illinois Central Industries, Inc., shall be considered as a carrier under section 5(3) and made subject to sections 20(1), (2), and (5), and to section 20a as aforesaid.

It is further ordered, That motions for discovery, petitions for an order overruling the examiner on matters relating to the admission or exclusion of evidence, and all motions or petitions to dismiss the proceedings, or to remand the proceedings to the examiner be, and they are hereby, denied.

It is further ordered, That the request of the Kansas City Southern Lines for further hearing with respect to its requested conditions be, and it is hereby, denied.

It is further ordered, That the Illinois Central Gulf Railroad Company when establishing changes in traffic rates and charges as may be required in effectuating the transactions herein approved may do so upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act and shall in schedules making such changes refer to this order by date and docket number.

It is further ordered, That if the authority herein granted is exercised, the Illinois Central Gulf Railroad Company shall submit for the consideration and approval of the Commission three copies of the journal entries required to record the transactions authorized herein.

It is further ordered, That this order shall become effective from and after 35 days from date of service.

It is further ordered, That if the authority granted herein is not exercised within 1 year from the effective date of this order, it shall be of no further force and effect.

And it is further ordered, That jurisdiction be, and it is hereby retained, over these proceedings, for the purpose of considering all matters which may be submitted pursuant to our requirements regarding ownership interests in the applicants and other railroads being granted relief herein or our conditions prescribed in the matter of employee protection, and for issuing such further orders as may be appropriate.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX D

TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

INTERSTATE COMMERCE ACT, SECTION 5(2). (49 U.S.C. 5(2))

§ 5, par. (2). Unifications, mergers, and acquisitions of control. (a) It shall be unlawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operation and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms

and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; Feb. 28, 1920, c. 91, § 407, 41 Stat. 580; June 16, 1933, c. 91, Title II, §§ 201, 202, 48 Stat. 217; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905; Aug. 2, 1949, c. 379, § 3, 63 Stat. 485.

INTERSTATE COMMERCE ACT, SECTION 5(11). (49 U.S.C. 5(11))

§ 5, par. (11). Plenary nature of authority under section. The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall as-

sent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; Feb. 28, 1920, c. 91, § 407, 41 Stat. 480; June 16, 1933, c. 91, Title II, § 202, 48 Stat. 217; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905.

AN ACT TO INCORPORATE THE ILLINOIS CENTRAL RAILROAD COMPANY, SECTION 18, 19 (Ill. Rev. Stat., 1975, Chap. 120, § 373):

"**373. Five per cent of income.]** § 18. In consideration of the grants, privileges and franchises herein conferred upon said company for the purposes aforesaid, the said company shall, on the first Mondays of December and June in each year, pay to the Department of Revenue of the State of Illinois five per centum on the gross or total proceeds, receipts or income derived from said road and branches, for the six months then next preceding. The first payment of such percentage on the main trunk of said road to commence four years from the date of said deed of trust, and on the branches, six years from the date aforesaid, unless said road and branches are sooner completed, then from the date of completion. And for the purpose of ascertaining the proceeds, receipts or income aforesaid, an accurate account shall be kept by said company, a copy whereof shall be furnishtd to the Governor of the State of Illinois and to the Department of Revenue; the truth of which account shall be verified by the affidavits of the treasurer and secretary of such company. And for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the Governor of the State of Illinois, the Director of the Department of Revenue, or any other person by law appointed, to examine the books and papers of said corporation, and to examine, under oath, the officers, agents and employees of said company, and other persons. And if any persons, so examined by the Governor or other authority, shall knowingly and wilfully swear falsely, or if the other

officers making such affidavits shall knowingly and wilfully swear falsely, every such person shall be subject to the pains and penalties of perjury."

(Ill. Rev. Stats. 1975, Chap. 120, § 374):

"**374. Lands taxable when conveyed—Application of tax, etc.]** § 22. The lands selected under the act of congress entitled "An Act granting the right of way, and making a grant of land to the states of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile", passed September 20, 1850, and authorized by this Act to be conveyed shall be exempt from all taxation under the laws of this state, until sold and conveyed by the Illinois Central Railroad Company or the trustees designated in this Act. The stock, property and assets belonging to the company shall be listed by the president, secretary or other officer, with the Department of Revenue, and an annual tax for state purposes shall be assessed, upon all the property and assets of every name, kind and description belonging to that company. Whenever the taxes levied for state purposes shall exceed ¾ of 1% per year, such excess shall be deducted from the gross proceeds or income required to be paid by the company to the state, and the company is hereby exempted from all taxation of every kind, except as herein provided for. The revenue arising from such taxation, and the 5% of gross or total proceeds, receipts or income aforesaid, shall be paid to the Department of Revenue and covered into the general revenue fund in the state treasury and applied to the payment of interest-paying state indebtedness until the extinction thereof. In case the 5% provided to be paid into the state treasury and the state

taxes to be paid by the corporation do not amount to 7% of the gross or total proceeds, receipts or income, however, then the company shall pay the difference, so as to make the whole amount paid equal, at least, to 7% of the gross receipts of the company."

BUSINESS CORPORATION ACT OF 1933, SECTION 160

(Ill. Rev. Stats. 1975, Chap. 32 § 157.160):

"**157.160.** § 160. Application of Act in certain cases. Nothing contained in this Act shall be held or construed to:

(a) Authorize or permit the Illinois Central Railroad Company to sell the railway constructed under its charter approved February 10, 1851, or to mortgage the same except subject to the rights of the State under its contract with said company, contained in its said charter, or to dissolve its corporate existence, or to relieve itself or its corporate property from its obligations to the State, under the provisions of said charter; nor shall anything herein contained be so construed as to in any manner relieve or discharge any railroad company, organized under the laws of this State, from the duties or obligations imposed by virtue of any statute now in force or hereafter enacted.

(b) Alter, modify, release, or impair the rights of this State as now reserved to it in any railroad charter heretofore granted, or to effect in any way the rights or obligations of any railroad company derived from or imposed by such charter.

(c) Alter, modify, or repeal any of the provisions of an Act entitled "An Act concerning public utilities," approved June 29, 1921, and amendments thereto. The term "public utility" or "public utilities" as used in this Act shall be the same as defined in said Act concerning public utilities."

AN ACT TO INCREASE THE POWERS OF RAILROAD CORPORATIONS, SECTION 2

(Ill. Rev. Stats. 1975, Chap. 114, § 166):

"And provided further, that nothing herein contained shall be so construed as to authorize or permit the Illinois Central Railroad Company to sell the railway constructed under its charter, approved February 10, 1851 or to mortgage the same, except subject to the rights of the state under its contract with said company, contained in its said charter, or to dissolve its corporate existence, or to relieve itself or its corporate property from its obligations to this state, under the provisions of said charter; nor shall anything herein contained be so construed, as to in any manner, relieve or discharge any railroad company, organized under the laws of this state, from the duties or obligations imposed by virtue of any statute now in force or hereafter enacted: And provided further, that nothing in this act shall be so construed as to authorize any corporation, other than those organized in and under the laws of this state, to purchase or otherwise become the owner, owners, lessee or lessees of any railroad within this state."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-310

DONALD R. SMITH, TREASURER OF ILLINOIS, MICHAEL J. BAKALIS, COMPTROLLER OF ILLINOIS, ROBERT M. WHITLER, DEPARTMENT OF REVENUE OF ILLINOIS, JOHN W. CASTLE, DIRECTOR, DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS OF ILLINOIS,

Petitioners,

vs.

ROBERT H. SNOW, INDIVIDUALLY AND ON BEHALF OF ALL OTHER TAXPAYERS SIMILARLY SITUATED, MARVIN E. SCHATZMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHER TAXPAYERS OF COOK COUNTY, ILLINOIS, EDWARD J. ROSEWELL, AS TREASURER AND EX-OFFICIO COLLECTOR OF COOK COUNTY, ILLINOIS, STANLEY T. KUSPER, JR., CLERK OF COOK COUNTY, ILLINOIS, THE COUNTY OF COOK, A BODY POLITIC AND CORPORATE, ILLINOIS CENTRAL GULF RAILROAD CO., A DELAWARE CORPORATION,

Respondents.

RESPONSE OF ROBERT H. SNOW AND MARVIN E. SCHATZMAN TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Respondents.

RESPONSE OF ROBERT H. SNOW AND MARVIN E. SCHATZMAN TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Respondents Robert H. Snow ("Snow") and Marvin E. Schatzman ("Schatzman") pray that the petitioners' petition for a writ of certiorari ("State petition") to review the judg-

ment and opinion of the Supreme Court of Illinois, entered April 5, 1977, be denied.

Prefatory Note.

Certain abbreviations are sometimes used herein as follows: Illinois Central Railroad Company ("IC"), Illinois Central Gulf Railroad Company ("Gulf"), Interstate Commerce Commission ("ICC"), the County of Cook and certain of its officials who are respondents herein ("Cook County"), the State of Illinois (the "State"), the State's petition for a writ of certiorari (the "State petition"), and the Gulf, Mobile & Ohio Railroad Company ("GM&O").

QUESTIONS PRESENTED.

Does the ICC (who took no such action) have any power to decide the purely State law questions of whether State tax immunities can be transferred to successor railroad corporations without the consent of the legislature?

Where the highest court of the State has fully and finally determined the purely State law questions of the transferability of State tax immunities to a successor railroad corporation, is that decision entitled to comity and finality?

Where the real remaining issue is whether the State should be permitted to retain all tax monies collected on a particular piece of property or whether the State must share with local taxing bodies such tax monies and where the highest court in the State has decided that state law issue, is that decision entitled to comity and finality?

Could IC's tax immunities, which were personal to it, be transferred to Gulf without the consent of the Illinois General Assembly?

Could IC's privilege of paying on the charter property the 7% tax in lieu of all other state taxes be transferred to Gulf without the consent of the Illinois General Assembly?

Where the State filed no pleading which raised nor otherwise presented to or preserved in the state courts certain issues, may the State raise such issues for the first time before this Court?

Where the State has filed no pleading requesting any of the relief which the State petition implies the State should have, does there exist any actual controversy to be resolved by this Court?

Where the State alleges error by the ICC but where the State (although it received the required notice) failed to appear before or to raise with the ICC the matters as to which the State now urges the ICC committed error, can the State collaterally attack the ICC's decision and has the State failed to exhaust its alleged administrative remedy?

Is the Interstate Commerce Act, particularly Section 5(12) thereof, 49 USC 5(12), constitutional?

If 49 USC 5(12) is constitutional, is one of its effects to give to any carrier in an ICC approved transaction, directly and without further action or finding by the ICC, full power to own any properties without State approval?

If 49 USC 5(12) is constitutional, is another of its effects to directly relieve any carriers in an ICC approved transaction (without further action or finding by the ICC) of all restraints, limitations, and prohibitions of State law insofar as necessary to carry out an ICC approved sale of assets?

STATEMENT OF THE CASE.

In 1851 the Illinois Central Railroad ("IC"), an Illinois corporation, received from the State of Illinois ("State") its charter (the "charter") to operate a railroad. Under the charter IC received certain land grant property (the "charter property"). Portions of the charter property constituted about 40% of IC's Illinois trackage and contained other operating structures as well. Other portions of the charter property (in excess of 2,000,000 acres) were sold by IC over a period of 124 years to third parties without the consent of the State.

Under the charter IC received as to the charter property immunity from all state and local taxation in exchange for which IC paid to the State in lieu of all such taxes a 7% tax (the "7% tax") upon charter property gross receipts. No portion of the 7% tax was distributed to local governments. All of the 7% tax was retained by the State.

Effective August 10, 1972, pursuant to a plan of reorganization (the "plan") approved by the Interstate Commerce Commission ("ICC"), IC and the Gulf, Mobile & Ohio Railroad ("GM&O") merged to become Illinois Central Gulf Railroad Company ("Gulf"), a new Delaware corporation. Regarding IC only, under the plan IC sold and conveyed all of its assets (including the charter property) to Gulf, IC was to be dissolved, and the new Delaware corporation, Gulf, was to be and was the surviving corporation. The plan contained no provisions for and did not mention IC's tax immunities, the transfer of IC's tax immunities to Gulf, or the assumption by Gulf of IC's privilege of paying the 7% tax in lieu of all other taxes on the charter property. The ICC never considered those matters either.

After the merger the successor railroad, Gulf (not IC), began to pay, and the State collected from Gulf, the 7% tax in lieu of all other state and local taxes on the charter property. The Illinois General Assembly never approved the merger and never consented to the transfer of IC's tax immunities to Gulf or to permitting Gulf to pay the 7% tax in lieu of all other taxes on the charter property.

Plaintiff Robert H. Snow ("Snow") filed this state court taxpayer's suit alleging that the actions of certain State officials in continuing to accept from Gulf (not IC) after the merger, the 7% tax in lieu of all other state and local taxes on the charter property was unlawful because (1) IC's tax immunities were personal to it, and could not be, and under the plan, in fact, were not conveyed to Gulf, and (2) the plain language of the charter stated that IC lost its charter property tax immunities if the charter property was "sold or conveyed". The complaint

prayed that the charter property be assessed, which would then require Gulf to pay all normal railroad taxes on the charter property.

A Cook County taxpayer, Marvin E. Schatzman ("Schatzman") intervened and adopted Snow's pleadings. Cook County also entered the case and adopted Snow's position. The trial court held that IC's tax immunities did not pass to Gulf under the plaintiffs' second theory, ordered the charter property assessed, and enjoined the State officials from collecting the 7% tax in lieu of all other taxes on the charter property. The Illinois Supreme Court decided that the language of the charter was uncertain but, with minor modifications, affirmed the trial court's judgment under the plaintiffs' first theory.

SUMMARY OF ARGUMENT.

First, no pleading filed by the State raised or preserved any federal or Tenth Amendment question. No brief filed by the State preserved or raised a Tenth Amendment question. The State's brief before the Illinois Supreme Court, however, did present one issue which may be pertinent here which was:

> "Whether the trial court erred in finding that the special Illinois Charter of the Illinois Central Railroad Co. and State laws prohibiting its corporate dissolution and transfer of charter assets have been effectively repealed by Interstate Commerce Commission order".

Thus, of the four "Questions Presented" at State petition, pp. 2 and 3, possibly only the first was preserved before the Illinois Supreme Court.

Second, the State absolutely misreads what is now Section 5(12) and what at the time of the merger was Section 5(11) of the Interstate Commerce Act, 49 USC 5(12) [formerly 49 USC 5(11) at the time of the merger]. That section contains two applicable clauses. The first is that:

> "*Any carrier* or corporation participating in or resulting from any transaction approved by the Commission there-

under, shall have *full power* * * * to carry such transaction into effect and *to own* and operate *any properties* and exercise any control or franchise acquired through said transaction *without* invoking any *approval under State authority* (emphasis added);"

The ICC approved the plan. The plan provided for the transfer of all of IC's assets (including the charter property) to Gulf. Thereafter, pursuant to that approval, IC by sale indenture "sold and conveyed" the charter property to Gulf. The only action taken by the ICC was to approve the plan.

Contrary to the State's "Questions Presented", the ICC did not repeal the 7% tax nor any other state statutes. The ICC took no action other than to approve the plan. Under the first clause of 49 USC 5(12) in an ICC approved transaction, the carrier is given full power to own any properties without approval under State authority. Although under the charter IC needed no State approval to sell the charter property to Gulf, even if it did, once the ICC approved the plan, the need for any State approval was suspended by direct action of 49 USC 5(12) without the necessity of any further action or finding by the ICC.

Therefore, by direct action of 49 USC 5(12), Gulf received full power to own the charter property without State approval because such sale was part of the ICC approved merger. No further action was taken nor was any finding made by the ICC because none was required, and because the State, although it received notice, never appeared before the ICC to present the questions which the State now raises. All of the State's "Questions Presented" ignore the clear language and effect of 49 USC 5(12). Every brief filed by the State has refused to acknowledge or deal with this simple fact.

Third, in addition, the second clause of 49 USC 5(12) provides:

"and *any carriers or other corporations* * * * participating in a transaction approved or authorized under the provi-

sions of this section shall be and they *are relieved* * * * *of all* other *restraints, limitations,* and *prohibitions of law,* Federal, *State,* or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and *to hold,* maintain, and operate *any properties* and exercise any control or franchises acquired through such transaction (emphasis added)."

Again, once the ICC approved the plan, which included sale of the charter property to Gulf, by direct action of the statute without any further action or finding by the ICC being required, IC and Gulf were relieved of all restraints, limitations and prohibitions of State law insofar as such relief was necessary to enable IC and Gulf to carry into effect the plan. The charter property was essential to the merger since it constituted 40% of IC's Illinois trackage as well as having situate thereon other railroad operating structures and properties. Therefore, all of the State's "Questions Presented" also are obviated by the second clause of 49 USC 5(12) as well.

Fourth, under the Illinois Supreme Court decision (the "state court decision") the charter property is no longer tax exempt and Gulf must now pay on the charter property the same taxes which Gulf pays on its non-charter property and which all other railroads pay on their Illinois property, no more and no less. There is, therefore, no discrimination and no undue burden on interstate commerce. In fact, a discrimination in favor of IC and against other railroads has been ended with the termination of IC's special state tax immunities.

Fifth, the taxpayer, Gulf, makes no complaint of the state court decision. This is so because having analyzed its new tax burden, Gulf has concluded that it will be more or less the same whether it pays the 7% tax or pays all other regular state and local taxes to which the charter property is subject now that IC's tax immunities are gone. Gulf so stated in its oral argu-

ment to the Illinois Supreme Court and also stated that it was not contesting which tax it paid.

Sixth, a principal effect of the state court decision is that now some of the tax money which previously went entirely to the State will go to local governmental units. This is the State's true objection to the state court decision. Even though Gulf may pay greater taxes on the charter property, depending upon final assessments, now that IC's tax immunities are gone, the State prosecutes this petition solely because the State still wants all, not just some, of the charter property tax money and wants local governmental units to receive nothing.

Seventh, whether IC's state tax immunities passed to a successor railroad corporation and whether local governmental units should share in tax revenue are purely local state issues which now have been resolved by the highest court of the State. That decision is entitled to comity. There are not present here federal constitutional issues or federal questions of any significance, despite the efforts of the State to create them. This is particularly true since the State never pleaded such issues in the state courts. The most obvious jurisdictional ground which the State might have claimed before this Court, i.e. the Contract Clause of the United States Constitution, never was raised by the State either in the trial court or before the Illinois Supreme Court.

Eighth, in another era when the Contract Clause of the U. S. Constitution was a more important jurisdictional ground before this Court, this Court passed many times on the precise question of whether state tax immunities granted to a railroad under a charter could be conveyed to a successor railroad corporation without the consent of the applicable legislature. This Court fully and finally determined that such tax immunities could not be so conveyed.

Among those cases are *Yazoo & Mississippi R. R.* v. *Vicksburg*, 209 U. S. 358 (1908); *Rochester Railway Co.* v. *Rochester*, 205 U. S. 236 (1907); *Yazoo and Mississippi* v. *Ry. Co.* v. *Adams*, 180 U. S. 1 (1900); *Chesapeake & Ohio*

Railway Co. v. *Miller*, 114 U. S. 176 (1885); *St. Louis, Iron Mountain & Southern Railway Company* v. *Berry*, 113 U. S. 465 (1885); *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 609 (1884); *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S. 244 (1883); *Wilson* v. *Gaines*, 103 U. S. 417 (1880); *Railroad Co.* v. *Georgia*, 98 U. S. (8 Otto) 359 (1878); and *Morgan* v. *Louisiana*, 93 U. S. 217 (1876). These ten cases were referred to in the state court decision and are hereinafter sometimes referred to as the "Charter Immunity Cases."

The Charter Immunity Cases expressly hold that tax immunities granted to a railroad under a charter without more cannot be conveyed to a successor railroad corporation without the consent of the legislature. This has been the settled law for over 70 years and the State presents no reasons for change, particularly where the taxpayer makes no complaint.

Ninth, the State continuously has asserted that the issues are (1) whether IC can be legally dissolved without the State's consent, and (2) whether the charter property can be conveyed to Gulf under the plan without the consent of the State. The first is not an issue. It makes no difference if IC is legally dissolved or not. However, because the State keeps raising the issue, it keeps receiving adverse rulings on this extremely ancillary point.

The issue which the state court decision decides is one which is purely local state law, *i.e.* whether IC's tax immunities could be or were conveyed to Gulf under the plan without the consent of the Illinois General Assembly. The state court decision by the highest court in the State decides a "cause of action" which "is one traditionally relegated to state law." *Piper* v. *Chris-Craft Industries, Inc.*, 97 S. Ct. 926 (1977), 45 U. S. L. W., at 4192, quoting *Cort* v. *Ash*, 422 U. S. 66 at 78; *Santa Fe Industries, Inc.* v. *Green*, 97 S. Ct. 1292, 45 U. S. L. W. 4317, 4321 (1977). That decision is entitled to both finality and comity. The state court decision concludes that the Illinois General Assembly did not so consent because it never took any

action at all on the question; that IC's tax immunities therefore could not be and, in fact, were not conveyed to Gulf under the plan; and that the ICC did not purport to decide, did not discuss, and apparently was not even aware that IC had any tax immunities.

IC's dissolution was irrelevant to those issues once IC conveyed all its assets, including the charter property, to Gulf, and also ceased doing business and stopped electing officers and directors. At that point IC was a meaningless shell and in keeping with this Court's decision in *Rochester Railroad Co.* v. *Rochester*, 205 U. S. 236, 256 (1906) that:

> "* * * A corporation without shareholders, without officers to manage its business, without property with which to do business, without the right lawfully to do business, is dissolved by the operation of the law which brings this condition into existence." (Citations.)

both the Illinois Supreme Court and the trial court on this ancillary question held that IC was dissolved.

Tenth, on the second issue, *i.e.* whether IC's charter property could be conveyed to Gulf under the plan without the consent of the State, the State has argued that it cannot be because the charter is a "solemn and binding contract" between IC and the State which cannot be unilaterally abrogated and that, in particular, there cannot be a sale of the entire railroad by IC without the consent of the State, citing as authority a line of cases of which *Thomas* v. *West Jersey R. Co.*, 101 U. S. 71, 83 (1879) is typical and which predate passage of the Interstate Commerce Act.

The response which both the state courts and all parties in this litigation (other than the State) have made to this argument is that Section 5(12) of the Interstate Commerce Act is a reality, that in *Illinois Central Gulf R. R.—Acquisition*, 338 ICC 805, 879-880 (1971) the ICC approved the plan and approved the transfer of all of IC's property (including the charter property) to Gulf and the dissolution of IC, that the ICC has paramount

and plenary power over the transportation aspects of the merger, and that under 49 USC 5(12) any State law which might have prohibited Gulf's ownership of the charter property was suspended, partly because the charter property constituted a part of the railroad right-of-way south through Illinois, was land over which the tracks ran and upon which stations and other necessary buildings were located, and therefore was essential to the merger. The State's sole response has been its erroneous belief that 49 USC 5(12) does not so provide, although this Court has so held in *Schwabacher* v. *United States*, 334 U. S. 182 (1948) and *Seaboard Air Line R. R.* v. *Daniel*, 333 U. S. 118 (1948).

In addition, as Snow has suggested and as both the trial court and the state court decision found, this argument of the State is pure abstraction. If the State were correct that the charter property could not be transferred to Gulf without the consent of the State, a necessary consequence would be that the five-year old merger would have to be rescinded; that IC and GM&O would become separate railroads again; that each would elect officers and directors after deciding which former Gulf shareholders would now become IC shareholders and which GM&O shareholders; that the IC and GM&O would recommence business separately, with immense ramifications as to their lessened financial strength and to their shareholders and the investing public, and with substantial problems and undoubted litigation under the federal securities laws and other laws; that in some cases new and in other cases amended tax returns for federal and state income tax and other state and local taxes would have to be filed with possibly drastic consequences; that Gulf's former lines of credit and debt financing would have to be entirely rearranged and separate financing would have to be arranged (if possible) for the two recreated but much weaker and smaller railroads (some of whose routes and services were terminated after the merger); and that all of the economics and advantages, which the ICC found (after years of hearings and much litigation) the merger would produce, would all be

lost, because, under the State's theory, IC's former charter was a "solemn and binding contract" between IC and the State.

All this is impossible, which the State well knows. The State's position before the various state courts and this Court constitutes the strongest possible argument why there must be power under 49 USC Sec. 5(12) to suspend state law to implement a railroad merger, consolidation, or reorganization. If the law were otherwise, every union of two railroads would be hounded out of existence by locally motivated litigation filed by a variety of state and local legal officers, either acting on their own initiative or at the instructions of various officials, having a multitude of purely state oriented motives.

If such had been the law, this country still would have a number of weak or bankrupt railroads each having 100 miles of less of track. Such a rule would completely frustrate any rational national transportation policy. The Illinois Supreme Court well recognized these problems, the fact that there was a national transportation policy and the need for it, and this recognition was a basis for the state court decision which the State petition now attacks.

In addition, as Snow has consistently argued and as the Illinois Supreme Court specifically found (State petition, p. A16), the State, although on *notice*, never appeared before either the ICC examiner or the ICC to assert the arguments which it asserts before this Court. If the State had, doubtless the ICC would have specifically dealt with them. Further, as the state court decision specifically finds, the State, although given a specific thirty-day continuance by the trial court to do so, never has filed a pleading in these proceedings attacking the merger, praying for recission or a reversion of the charter property to the State or reconveyance of the charter property to IC or that IC recommence business, or requesting any of the relief which it now implies to this Court it should have. All that the State has done is to file various memoranda and briefs asserting purely theoretical arguments and advising that some day in a forum of

its own choosing the State may, but might not, file pleadings praying for such relief. There is, therefore, no actual controversy before this Court.

The state courts have extended the State every courtesy and have patiently heard and considered what obviously are only theoretical arguments at best. The State never has prayed for any relief. When a party, although specifically requested by the trial court to do so and when given a specific continuance in which to do so, consistently refuses to file pleadings requesting the relief which its memoranda and briefs imply it should have, that party has had more than its day in court, it is little wonder that the state courts showed impatience, and this four year old litigation should end.

ARGUMENT.

Specific Responses to State Petition.

Opinion Below.

(State petition, p. 2)

The abbreviated excerpts cited by the State from the ICC opinion, 338 I. C. C. 805, 879-880, 940-1 (1971) do not fairly reflect either the ICC's actions or its considerations and reference should be had to the entire opinion for a complete understanding of what the ICC considered, found, and held.

Jurisdiction.

(State petition, p. 2)

The State petition, both under "Jurisdiction", State petition, p. 2, and "Questions Presented", State petition, pp. 2 and 3, implies that the ICC considered or otherwise ruled upon the 7% tax and whether IC's tax immunities passed to Gulf. The ICC never did and the state court decision does not so hold. Nowhere does the ICC opinion or its examiner's opinion consider state taxation or state tax immunities. These issues never were

presented to the ICC and doubtless the ICC never was even aware that IC had tax immunities.

Statement of the Case.

(State petition, p. 5)

The Illinois railroad Corporation Act and the Illinois Business Corporation Act cited at State petition, pp. 5 and 6, were passed 34 years and 58 years, respectively, after IC's charter was granted. Regarding their inapplicability, the Illinois Supreme Court held (State petition, p. A11):

> "* * * we decline the State's invitation to construe the acts of the legislature, 34 years or more after the charter's acceptance by IC and enactment by the General Assembly, to imply such a term in the contract between IC and State."

The statement at State petition, p. 6, that:

> "The State of Illinois was not a party to the proceedings before the Commission. The Commission did not decide any question concerning the power of the Illinois Central to unilaterally dissolve its Illinois corporate existence and transfer away its charter properties, so as to relieve it from its obligation to pay the Charter Property Receipts Tax and other duties and obligations existing under Illinois law."

is best answered by the finding in the state court decision (State petition, p. A16) that:

> "(We point out in this regard that the State, though given notice and invitation to attend the Commission hearings on the subject plan of reorganization, declined to attend.)"

Had the State appeared before the ICC and raised the issues which it seeks to raise before this Court for the first time, they would have been ruled upon. However, the State chose not only not to exhaust its administrative remedy (if it truly contends that the ICC has power over state taxation and state tax immunities) but it failed to avail itself of this alleged administrative remedy at all.

The statement (State petition, p. 6) that this case originated in November, 1973 is incorrect. Snow's original complaint was filed in May, 1973. State petition, pp. 6 and 7, somewhat misstates the complaint filed. In essence, the complaint sought a declaration that IC's tax immunities had not been transferred to Gulf, to compel certain State officials, whose duty it was, to assess the charter property which never before had been assessed because until the merger it had been immune from State taxes under the charter, and to enjoin the expenditure of State funds to collect the 7% tax from Gulf in lieu of all other taxes on the charter property because it was only IC (not Gulf) which had the tax immunity and the privilege of paying the 7% tax in lieu of all other taxes on the charter property.

At State petition, pp. 8 and 9, under the subheading "How the Federal Question Is Preserved", the State points out that Gulf's answer (not the State's answer and not Snow's complaint) raised certain federal questions. Neither Snow's complaint nor the State's answer thereto raised any Tenth Amendment or other federal question. Gulf (who seeks no appeal to this Court) raised certain federal questions in its brief, the State raised one possible federal question in its brief, Snow responded to them by brief, and the state courts decided those questions adversely to Gulf and the State.

The State never filed an answer or counterclaim raising federal questions, asking for the charter property to be forfeited to the State or returned to IC, praying that IC be ordered to once again commence doing business or that the merger be undone, or praying for any of the relief which its various briefs and memoranda imply it should have. Other than praying that Snow's complaint be dismissed, the State never has prayed for any relief.

Reasons for Granting the Writ.

(State petition, p. 10.)

State petition, pp. 10 and 11, argues:

> "The issue of whether the Illinois Central Railroad Company has the right to unilaterally dissolve its special charter existence, transfer away its charter property and thus relieve itself of its duty to pay the Charter Property Gross Receipts Tax in contravention of Illinois law was not decided by the Interstate Commerce Commission, nor has the issue ever been adjudicated in a court of competent jurisdiction."

Breaking the foregoing down, some of it is true and some of it is not. First, nothing in the charter itself states that the State must consent to a sale of the charter property. To the contrary, the charter expressly contemplates sales of charter property to third parties without the State's consent and IC made such sales for 124 years with the knowledge of the State.

Second, the issue of IC's dissolution was before the ICC because IC's dissolution was part of the plan. No one before the ICC (least of all the State) challenged whether it could be done without the consent of the State. The State, while having received the required notice, never bothered to appear before the ICC and raise the issues which it now argues the ICC should have considered. IC's dissolution has been passed upon by two courts of competent jurisdiction, the trial court and the Illinois Supreme Court, who decided that since IC was a meaningless shell without income, assets, officers, or directors, it should be dissolved, citing *Rochester Railway Co.* v. *Rochester*, 205 U. S. 236, 256 (1906).

Third, the same is true of the transfer of the charter property from IC to Gulf. It was part of the plan approved by the ICC. Without transfer of the charter property, there could have been no merger since the charter property constituted 40% of IC's total Illinois trackage. As a practical matter without the

charter property, Gulf probably would not have a right-of-way into Chicago. The State, although on notice, never appeared before the ICC to challenge whether the charter property could be transferred to Gulf without the consent of the State.

The State cannot now be heard to collaterally attack the ICC's approval of that portion of the plan under which the charter property was conveyed to Gulf. That conveyance and the merger are a reality. They cannot be undone five years later in a state court proceeding in which no party (particularly the State) has ever filed a pleading praying that they be rescinded.

Fourth, the ICC did not consider or decide whether IC's tax immunities were conveyed to Gulf or whether Gulf had the right to pay the 7% tax in lieu of all other state and local taxes on the charter property. This was so because those questions were not part of the plan, and no one presented those issues to the ICC because state taxation and state tax immunities are among those matters left under the Interstate Commerce Act to be decided by courts of competent jurisdiction. The ICC has no power over state taxation and state tax immunities and the ICC did not purport to consider those issues because the power to tax is expressly reserved to the States under the Tenth Amendment to the U. S. Constitution (so long as there is neither discrimination nor an undue burden on interstate commerce) and "the power to tax all property, businesses, and persons, within their respective limits, is original in the States and has never been surrendered". *Thomson* v. *Pacific Railroad*, 76 U. S. 579, 591 (1869).

The trial court and the Illinois Supreme Court were courts of competent jurisdiction to decide the purely state law questions of whether IC's tax immunities passed to Gulf and whether Gulf could continue to pay the 7% tax in lieu of all other state and local taxes on the charter property or whether the charter property now had to be assessed and regular railroad taxes paid on it. Those questions were squarely raised by Snow's

complaint and both the trial court and the Illinois Supreme Court held against the State on all issues.

State petition, pp. 11-14, argues that since the ICC did not expressly hold that it was superseding state law to permit the charter property to be conveyed to Gulf without the State's consent, the ICC cannot be presumed to have done so. As previously pointed out herein, there is no language in the charter which requires that the State must consent to a conveyance of the charter property; the charter expressly contemplates sales of charter property to third parties without the State's consent; IC sold over 2,000,000 acres of charter property over a period of 124 years without the State's consent; the State failed to exhaust its administrative remedies by presenting this question to the ICC after having received notice of the merger, plan, and ICC proceedings; once the ICC approved the merger, 49 USC §5(12) directly superseded any State law which barred conveyance of the charter property without any further action by the ICC being required, partly because there could have been no merger without the charter property since it constituted 40% of IC's Illinois trackage and had located upon it main line track, siding, stations, and other structures necessary to run the railroad.

State laws are not being lightly set aside (State petition, p. 13). State law had to be so set aside for there to be a merger at all. The ICC never made an express finding regarding State law because it was not required to do so under either of the two clauses of 49 USC § 5(12) and because of the State's gross negligence in not appearing before the ICC (after receiving the required notice) and raising what the State apparently asserts is a defense to the plan and merger. The five year old merger of IC and GM&O is a reality which cannot be overturned by the State's collateral attack when the State never has filed either before the ICC or the state courts a pleading requesting the relief to which its briefs claim the State is entitled.

State petition, pp. 12-14, cites *Florida* v. *United States*, 282 U. S. 194, 211-212 (1930); *North Carolina* v. *United States*, 325 U. S. 507, 520 (1944); *Arkansas Railroad Com.* v. *Chicago R. I. & P. R. Co.*, 274 U. S. 597 (1926); and *Illinois Central Railroad Co.* v. *Public Utilities Commission*, 245 U. S. 493, 510 (1918) for the proposition that state laws are not automatically overriden by decisions of the ICC. Sometimes this is true, but it is a truth which has no application to the present case. None of the above cases are applicable here. None involved either 49 USC 5(2) or 5(12).

All of the above cited cases dealth with intrastate rates which are not involved here. All but one of them predated the National Transportation Act. None involved mergers, reorganizations, or applications of either 49 USC 5(2) or 5(12). In particular, in the instant case it is the automatic and direct action of 49 USC 5(12) which has served to set aside state law to permit the carrier, Gulf, to own the charter property without invoking State authority.

State petition, p. 12, attempts to distinguish *Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118, 124 (1948) on the basis that:

> "* * * this Court held that the appellant railroad company was relieved of the necessity of complying with certain South Carolina constitutional and statutory provisions because the Interstate Commerce Commission had expressly stated in its order that this was its intention."

This misstates this Court's opinion. In *Seaboard* at 68 S. Ct. 429-30 South Carolina had argued that the ICC did not intend to set aside state law. This Court merely examined that portion of the ICC order which made a finding that compliance with the particular South Carolina law in question would not be in the public interest, and found that this sufficiently expressed the ICC's intent to set aside South Carolina law. The Court did not hold that such a finding had to be made. It merely found in *Seaboard* that the ICC had made such a finding, which the court

then referred to in its opinion. The State never does distinguish *Schwabacher* v. *United States*, 334 U. S. 182, 68 S. Ct. 958 (1948) relied upon in the state court decision.

State petition, pp. 14-17, argues that ICC approval generally is permissive only, leaving to the courts matters of law. In certain instances this is true with the exception of 49 USC 5(12) which has the direct effect of superseding state law to permit carriers to own property in ICC approved transactions without State approval and which also supersedes state law insofar as that may be necessary to implement an ICC approved transaction. None of the cases cited at State petition, pp. 14-17, namely, *Central Freight Lines, Inc.—Control—Alamo Exp.*, 90 MCC 96, 100-101 (1962); *McGary Transportation Co., Inc.-Purchase-DeMelle*, 50 MCC 608, 611 (1948); *Texas & N. O. R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F. 2d 151, 159-60 (5th Cir. 1962), cert. den. 371 U. S. 952, 83 S. Ct. 508 (1963), reh. den. 375 U. S. 871, 84 S. Ct. 28 (1963); and *United States* v. *Interstate Commerce Commission*, 396 U. S. 491, 526 (1970) dealt with transactions falling within § 5(12) of the Interstate Commerce Act. The same is true of *Palmer* v. *Massachusetts*, 308 U. S. 79, 84 (1939) (State petition, p. 19) and *Laurence* v. *St. Louis-San Francisco Ry Co.*, 274 U. S. 588, 595 (1926) (State petition, p. 20).

State petition, pp. 14-17, urges that the ICC could not decide whether IC could deliver good title to the charter property. That might be true except that good title never has been an issue in this case. The only issues raised by the pleadings herein are (1) whether IC's tax immunities passed to Gulf under the merger, (2) whether Gulf may pay and certain state officials may collect the 7% tax in lieu of all other state and local taxes on the charter property, or (3) whether the charter property must now be assessed and regular railroad taxes paid on it.

Whether Gulf has good title, merely colorable title, or bad title is raised by no pleading in this case nor by the state court

decision. No one questions that IC executed and delivered to Gulf a sale indenture under which IC sold and conveyed to Gulf five years ago all of IC's assets including the charter property, and that IC went out of business. If the State seeks recission, it should have counterclaimed or filed a separate action somewhere, which it did not do.

In fact, if Gulf did not own or have title to the charter property, since the State has collected roughly $18,000,000 from Gulf since 1972, the State is in the unique position of having its chief legal officer confess error by indirectly admitting that the State has collected roughly $18,000,000 from the wrong taxpayer. Presumably, the State also is willing to refund that sum to the taxpayer from whom the State infers it wrongfully collected it.

State petition, pp. 18-20, relying largely on this Court's decision in *Thomas* v. *West Jersey R. Co.*, 101 U. S. 71, 83 (1879); *York & M. L. R. Co.* v. *Winans*, 58 U. S. 30, 39 (1854); *Branch* v. *Jesup*, 106 U. S. 458, 463 (1883); *Pennsylvania R. Co.* v. *St. Louis A. & T. H. R. Co.*, 118 U. S. 290, 313 (1886); and *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 41 (1891), all of which dealt with fact situations which arose before passage of 49 USC § 5(11), urges that railroads "cannot unilaterally absolve themselves from the performance of their obligations under their charters without the consent of the State legislature".

As previously pointed out, the State's quarrel really is with Congress, not with the courts. Whether the State believes it or not, 49 USC § 5(12), under its first clause directly supersedes state law to permit carriers to own property in ICC approved transactions without State approval, and under its second clause suspends state law insofar as is necessary to implement a merger. It certainly was necessary to suspend state law in the instant case if the State is correct in its assertion that the State's consent was necessary for the charter property to be conveyed to Gulf.

Since the language of the charter does not require State consent for sales by IC of charter property and since IC sold charter property for 124 years without State consent, probably the State's position is wrong from the start that State consent was necessary to convey the charter property to Gulf. However, if the State is correct, then such State law has been so superseded. Insofar as *Thomas* v. *West Jersey R. Co., York & M. L. R. Co.* v. *Winans, Branch* v. *Jesup, Pennsylvania R. Co.* v. *St. Louis A. & T. H. R. Co., and Central Transportation Co.* v. *Pullman's Palace Car Co.* are based on federal law, they also have been superseded by 49 USC 5(12).

State petition, p. 19, as previously pointed out, asserts a Tenth Amendment argument which the State never asserted in either the trial court or the Illinois Supreme Court. It was the plaintiffs (not the State) who argued in response to Gulf's answer that the ICC had no power over either state tax immunities or state taxation, that both of those powers are reserved to the states under the Tenth Amendment, and that in any event neither the plan nor the ICC purported to deal with either state tax immunities or state taxation.

In addition, the State misconstrues the facts. The ICC did not purport to decide whether IC's tax immunities passed to Gulf or whether Gulf could pay the 7% tax in lieu of all other state and local taxes. All that the ICC did, insofar as it is pertinent to this case, was to approve the plan under which the charter property was to be conveyed to Gulf and IC was to be dissolved. It was then left to the merging carriers to do those things, which they did.

IC conveyed the charter property to Gulf, IC ceased doing business and has conducted no business for five years, and IC attempted to dissolve by filing articles of dissolution with the Illinois Secretary of State, but the Secretary of State concluded he had no statutory authority to accept them since his statutory authority only extended to general business and not-for-profit

corporations organized under statutes passed many years after 1851.

It was the trial court and the Illinois Supreme Court (not the ICC), based upon the plaintiffs' complaint, which decided that IC's tax immuniites did not pass to Gulf, that Gulf could not pay the 7% tax in lieu of all other state and local taxes on the charter property, and that the charter property had to be assessed and regular railroad taxes paid upon it, which decisions neither IC nor Gulf appeal to this Court. There has been no federal impingement on the state courts to decide these state questions. It was the state courts which decided such questions adversely to the State, which state court decisions the State now seeks to reverse.

The trial court and the Illinois Supreme Court rightly concluded that there would have been no merger unless the charter property could be conveyed to Gulf without the consent of the State because the charter property was critical to the merger; that if the State had bothered to appear before the ICC to argue that the charter property could not be conveyed without the State's consent, the ICC, of necessity and in order to implement the national transportation, would have found that such state law had to be superseded in order to implement the merger; and that since the State, after notice, did not trouble itself to appear before the ICC and since the plan specifically provided that IC was to convey the charter property to Gulf, the state courts could only conclude that after the ICC's approval of the plan, 49 USC § 5(12) superseded state law to permit Gulf to own the charter property without State approval and that the same statute also superseded state law insofar as was necessary to permit the charter property to be conveyed to Gulf.

State petition, pp. 20-21, argues that the 7% tax is imposed upon IC and that IC cannot avoid it by dissolution. That is fine except IC has no income, assets, officers or directors. It therefore cannot pay the 7% tax. IC's dissolution has nothing to do with its inability to pay the 7% tax. IC's lack of assets

and income renders it unable to pay the 7% tax. The State further argues that state statutes passed 34 and 50 years respectively after the charter was granted prohibit IC from dissolving or transferring assets. IC never consented to those subsequent statutes and since, as the State urges, the charter was a binding and solemn contract which could not be unilaterally amended or abrogated by either party and since IC derived all of its rights and powers from the charter alone, those subsequent statutes do not affect IC or this case, a conclusion which the state court decision also reaches (State petition, p. A11).

CONCLUSION.

The plan, which was approved by the ICC, approved the merger and provided, among other things, that IC was to convey the charter property to Gulf. Conveyance of the charter property to Gulf was necessary to the merger. There could have been no merger without it. The merger was implemented five years ago and at that time IC, in fact, conveyed the charter property (and all of its other assets) to Gulf.

The plan did not provide for and the ICC did not pass upon or consider state taxation or state tax immunities. Although it received proper notice, the State never appeared before the ICC to argue that state law prohibited conveyance of the charter property to Gulf. In fact, state law does not prohibit conveyance by IC to Gulf of the charter property since the charter expressly contemplates charter property sales to third parties and such sales were made by IC with the knowledge of and without the consent of the State for 124 years.

A necessary consequence of the State's failure to appear and make its arguments before the ICC is that, as the Illinois Supreme Court held, the national transportation policy must be implemented and since the ICC decision approved the merger, 49 USC § 5(12) superseded state law to permit conveyance of the charter property to Gulf. The State implies an administrative

remedy which it chose to ignore. The State cannot lie back and then collaterally attack the ICC decision. The ICC approval of the plan, therefore, is final; IC conveyed whatever title it had to the charter property (and all its other assets) to Gulf; and the merger was implemented, is final, and cannot be undone.

Although the State argued (State petition, pp. A11-12) that IC's unilateral actions in transferring (with ICC approval but without State approval) all of its assets to Gulf constituted a forfeiture and reversion to the State of the charter property, the State only abstractly so argued, because it never filed a pleading praying for that or any other relief, although the trial court gave the State an express 30-day continuance to file such a pleading, which the State refused to do. There is, therefore, no actual controversy on the issues sought to be raised in the State petition.

Not the ICC but rather the state courts decided that IC's tax immunities were not and could not be conveyed to Gulf under the plan without the consent of the Illinois General Assembly (which had not been given), that Gulf could not pay and State officials could not collect the 7% tax in lieu of all other state and local taxes on the charter property, that the proper state officials were required to assess the charter property, and that Gulf was required to pay on the charter property the same railroad taxes which it paid on its non-charter property and which all other railroads pay on their Illinois property. The state court decision is absolutely correct on all issues.

In addition, there is no novel or important issue worthy of this Court's consideration. This Court many times in the Charter Immunity Cases, beginning 100 years ago, decided the questions upon which the state court decision rests. The state court decision merely reflects what has been for over 70 years the settled law regarding the transfer of tax immunities to successor

railroad corporations where the legislature has not given its approval. The State petition, therefore, should be denied.

Respectfully submitted,

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No. 77-310

In the

Supreme Court of the United States

OCTOBER TERM, 1977.

DONALD R. SMITH, Treasurer of Illinois, MICHAEL J. BAKALIS, Comptroller of Illinois, ROBERT M. WHITLER, Department of Revenue of Illinois, JOHN W. CASTLE, Director, Department of Local Government Affairs of Illinois,

Petitioners,

vs.

ROBERT H. SNOW, individually and on behalf of all other taxpayers similarly situated, MARVIN E. SCHATZMAN, individually and on behalf of all other taxpayers of Cook County, Illinois, EDWARD J. ROSEWELL, as Treasurer and Ex-Officio Collector of Cook County, Illinois, STANLEY T. KUSPER, JR., Clerk of Cook County, Illinois, THE COUNTY OF COOK, a body politic and corporate, ILLINOIS CENTRAL GULF RAILROAD CO., a Delaware Corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois.

BRIEF OF RESPONDENT ILLINOIS CENTRAL GULF RAILROAD CO. IN OPPOSITION

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BRIEF OF RESPONDENT ILLINOIS CENTRAL GULF RAILROAD CO. IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's Statement of the Case is inaccurate and misleading. It seeks to create the impression that the Supreme Court of Illinois resolved a conflict between the power of the State of Illinois to tax certain properties formerly belonging to the Illinois Central Railroad (IC) and the power of the Interstate Commerce Commission (I.C.C.) in approving the reorganization of the IC and the Gulf, Mobile and Ohio Railroad (GM&O) into a new entity—the Illinois Central Gulf Railroad (Gulf). No such conflict was put in issue or necessarily decided. Rather, the decision below principally involved only the question of the proper method for the State to tax the former property of IC after that property had been sold to Gulf in the I.C.C.-approved merger. This case was brought as a taxpayers' class action, to compel certain state officials to assess and tax the Gulf properties acquired from IC in the same manner that all the other railroad property in the state was assessed and taxed, rather than pursuant to the 1851 IC Charter. That Charter provided for a 7% gross receipts tax, in lieu of all other forms of taxation on the Charter property. Respondent herein, Gulf, claimed that it was entitled to be taxed on the Charter properties in the same manner as IC had been taxed. It did not prevail in that contention and accepts the result. It is perfectly willing to be taxed on the same basis as all other railroads in Illinois.

REASONS FOR DENYING THE WRIT

I

THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION OVER THIS CAUSE UNDER 28 U.S.C. §1257(3).

(A)

THERE IS NO QUESTION OF THE VALIDITY OF A STATE STATUTE ON THE GROUNDS OF ITS BEING REPUGNANT TO THE LAWS OF THE UNITED STATES.

Petitioner claims that this Court has jurisdiction to review the decision of the Supreme Court of Illinois under 28 U.S.C. §1257(3). Points A and B under its "REASONS FOR GRANTING THE WRIT" (Petition at 11-17) are an attempt to come within the second basis for jurisdiction under §1257(3)—"the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States." The Petitioner's position is premised upon its erroneous construction of the 1851 Charter and subsequent Illinois statutes as prohibiting the transfer of the IC charter property to Gulf under any circumstances. However, this construction of the 1851 Charter and the subsequent laws was expressly rejected by the Illinois Supreme Court when it said:

> Although we are unable to conclude that these provisions authorize the sale of the railroad as an entity we are *likewise unable to infer from these and other charter terms that the IC was forbidden to make such a sale.* No language in the charter may be fairly interpreted to prohibit such sale and we decline the State's invitation to construe the acts of the legislature 34 years or more after the charter's acceptance by IC and the enactment by the General Assembly, to imply

such a term in the contract between IC and the State. (Petition at A. 11) (emphasis added).

The opinion went on to discuss the I.C.C.'s powers, not as applied to rendering any state law invalid, but solely as creating a binding determination of "public interest" superseding the public policy prevailing when *Thomas* v. *West Jersey R.R.*, 101 U.S. 71 (1880) was decided.

The petitioner can not create an issue concerning the validity or repugnancy of the three state statutes cited in the Petition unless this Court first construes such statutes to prohibit sale of the IC property to Gulf. But this Court has stated that it has no jurisdiction authoritatively to construe state legislation. *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1970). Certainly it will not construe a state statute contrary to the express construction given by that state's supreme court.

The Illinois Supreme Court thus decided that state law did not prohibit the transfer of the IC property to Gulf. It also decided that the contractual right of IC to pay the charter tax in lieu of all other taxes was personal to IC and could not be transferred to Gulf. This decision rests upon adequate independent state grounds, precluding this court from exercising jurisdiction. *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935).

(B)

PETITIONER DID NOT PROPERLY PUT INTO ISSUE ANY FEDERAL TITLE, RIGHT, PRIVILEGE OR IMMUNITY.

(1)

THERE IS NO TENTH AMENDMENT QUESTION.

The opinion of the Illinois Supreme Court makes no reference to the tenth amendment of the United States

Constitution. That is because Petitioner made no reference to the tenth amendment until its request for rehearing. This was untimely. *Bowe* v. *Scott*, 233 U.S. 658 (1914).

Under any circumstances, Petitioner's tenth amendment issue is specious. The Illinois Supreme Court's determination that all of Gulf's property should be taxed under state laws generally applicable to all railroads, rather than to have a portion of the property taxed specially, is a determination of the method of taxation, as a matter of state law. The power of taxation reserved to the states by the tenth amendment is in no way infringed upon or questioned by the decision.

(2)

PETITIONER NEVER PROPERLY PUT THE VALIDITY OF THE REORGANIZATION IN ISSUE.

Petitioner never filed any pleading requesting the trial court to invalidate the consolidation of GM&O and IC into Gulf. It now in effect requests this Court to undo a five-year-old reorganization to which Petitioner has never directly objected. As the Illinois Supreme Court noted, the State was notified of the Interstate Commerce Commission proceedings but declined to attend. (Petition A16). Petitioner cannot seek relief for the first time in this Court when it wholly failed to exhaust the administrative remedies available to it before the I.C.C. more than 7 years ago.

II

THERE IS NO SUBSTANTIAL FEDERAL QUESTION.

Regardless of its holding that no state law had been invalidated, to the extent that the Illinois Supreme Court

could be deemed to have passed upon a "federal question" by its citation of the Interstate Commerce Act and cases such as *Schwabacher* v. *U.S.* 334 U.S. 182 (1948) and *Seaboard Airlines R.* v. *Daniel* 333 U.S. 118 (1948) its decision is in full accord with the decisions of this Court and the laws of this land. Thus no showing has been made under Rule 19(1)(a) of the Rules of this Court that the decision of the Illinois Supreme Court was "probably not in accord with applicable decisions of this Court."

Similarly Petitioner has not raised a question of substance not heretofore determined by this Court as called for in Rule 19(1)(a). The Petitioner does not dispute the I.C.C.'s preemptive powers under renumbered section 5(11) of the Interstate Commerce Act, (49 U.S.C. §5(12)), but rather seeks to raise the narrow question whether absent a specific mandate by the I.C.C. ordering the Charter to be overridden, no such overriding should be implied. (Petition at 11). This contention is contrary to the long established and unquestioned authority of the I.C.C. under section 5(12) of the Act. The very language of section 5(12) provides that a plan approved by the I.C.C. may be carried out,

> without invoking any approval under State authority; . . . relieved from the operation . . . of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary . . . to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission. . . . [A]ny power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

There is no requirement in the statute that the I.C.C. enumerate the laws it intends to preempt, and case law is to the contrary. In *Brotherhood of Locomotive Engineers* v. *Chicago & N. W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963), it was held that *absent language manifesting a contrary intention,* I.C.C. approval of a railway merger carried with it an exemption from restraint of any other law inhibiting implementation of the merger.

While an inhibiting federal law was in issue in that case, the same reasoning applies to inhibiting state laws. As the Illinois Supreme Court pointed out, the sale of IC was the very foundation of the Plan of Reorganization approved by the I.C.C., and any state law or charater term inhibiting such sale would necessarily be overridden by the I.C.C.'s approval of the Plan. (Petition at A.15).

Moreover, the I.C.C. has long held that it need not expressly declare what laws are being overridden, since it deems section 5(12) to be self-executing. *Chicago, St. P., M. & O. Ry. Lease,* 295 I.C.C. 696. The court in *Brotherhood of Locomotive Engineers, supra,* expressly concurred with the I.C.C. in that proposition (314 F.2d at 432). The federal law as cited by the Illinois Supreme Court is thus firmly and soundly established. There is no substantial unresolved question of federal law involved in this matter.

Put simply, Petitioner contends that the I.C.C. could not validly approve the IC-GM&O-Gulf reorganization without expressly stating that it was overriding conflicting Illinois law. Petitioner makes this contention despite the I.C.C.'s ruling that it does not make such determinations, despite Petitioner's failure to alert the I.C.C. that there was a potential conflict with any state law, and despite the determination of the Illinois Supreme Court that no

such conflict exists. Petitioner's contention is not only unsubstantial, it borders on the frivolous.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied.

Respectfully submitted,

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No. 77-310

In the

Supreme Court of the United States

October Term, 1977

DONALD R. SMITH, Treasurer of Illinois, MICHAEL J. BAKALIS, Comptroller of Illinois, ROBERT M. WHITLER, Department of Revenue of Illinois, JOHN W. CASTLE, Director, Department of Local Government Affairs of Illinois,

Petitioners,

vs.

ROBERT H. SNOW, individually and on behalf of all other taxpayers, similarly situated, MARVIN E. SCHATZMAN, individually and on behalf of all other taxpayers of Cook County, Illinois, EDWARD J. ROSEWELL, as Treasurer and Ex-Officio Collector of Cook County, Illinois, STANLEY T. KUSPER, JR., as Clerk of Cook County, Illinois, THE COUNTY OF COOK, a body politic and corporate, ILLINOIS CENTRAL GULF RAILROAD CO., a Delaware Corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Illinois.

BRIEF OF RESPONDENTS COUNTY OF COOK, EDWARD J. ROSEWELL, AND STANLEY T. KUSPER, JR. IN OPPOSITION

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BRIEF OF RESPONDENTS COUNTY OF COOK, EDWARD J. ROSEWELL, AND STANLEY T. KUSPER, JR. IN OPPOSITION

Respondents County of Cook, Edward J. Rosewell, and Stanley T. Kusper, Jr., submit that the Petition filed herein incorrectly construes the opinion of the Illinois Supreme Court (Petition at A. 1-A. 23) and seeks review of issues not properly placed before this Court.

REASONS FOR DENYING THE WRIT

THE ISSUES PRESENTED IN THE PETITION INVOLVE THE INTERPRETATION BY A STATE COURT OF A STATE STATUTE AND PRESENT NO SUBSTANTIAL FEDERAL QUESTION.

Contrary to the arguments presented in the Petition filed herein, the decision of the Illinois Supreme Court sought to be reviewed presents no conflict between state and federal statutes. In approving the Plan of Reorganization of the Illinois Central Railroad Company (Illinois Central) and the Gulf, Mobile and Ohio Railroad Company into a new entity, the Illinois Central Gulf Railroad Company (Gulf), the Interstate Commerce Commission made no attempt to determine the question of the transfer of Illinois Central's state charter tax obligations and immunities to Gulf. As the Illinois Supreme Court noted, such a determination was not necessary to effect the proposed transaction and, therefore, "the Commission's approval of the Plan did not operate to extend the otherwise invalid charter tax and concurrent exemptions to Gulf." (Petition at A. 19)

That the question of the charter tax immunities was not encompassed in the Commerce Commission's decision is evident in that the opinion of the Commission is totally devoid of any express discussion of the transfer of Illinois Central's immunities to Gulf. As the Illinois Supreme Court stated:

> "This conclusion is further based on the fact that the Commission did not address, much less attempt to adjudicate, the question of such charter tax exemptions in its detailed, 76-page opinion approving the transfer. The Plan itself nowhere makes any explicit reference to the charter tax obligations of IC or of their transfer to Gulf. . . . Further, no express reference to the charter tax exemptions is made anywhere in the Plan, the exhibits, or the opinion of the Commission." (Petition at A. 19-20)

The only state laws which were affected by the Commission's approval of the Plan of Reorganization were those enactments which would otherwise prevent the sale of Illinois Central and prohibit Gulf's ownership of the charter property. *Schwabacher* v. *United States,* 334 U.S. 182 (1948); *Seaboard Air Line R. R.* v. *Daniel,* 333 U.S. 118 (1948); 49 U.S.C. § 5(12). At the heart of the Commission's approval of the Plan was the dissolution of the Illinois Central Railroad Company. Included among the statutory findings of the Commission was:

> "(c) the sale, assignment, and transfer of the properties of Illinois Central Railroad Company to Illinois Central Gulf Railroad Company, and the liquidation and dissolution of the Illinois Central Railroad Company, . . ." 338 I.C.C. 805, 879 (1971).

The Illinois Supreme Court correctly concluded that to the extent necessary to effect the Section 5(12) transaction, any state law which prohibited the dissolution of the Illinois Central Railroad Company was overridden. (Petition at A. 12) In so holding, the court below cited the pertinent sections of 49 U.S.C. § 5(11), now § 5(12), which provides:

> "(A)ny carrier . . . participating in . . . any transaction approved by the Commission . . . shall have full power . . . to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers . . . participating in a transaction approved or authorized under the provisions of

> this section shall and they are relieved from the operation of . . . prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for . . ., and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. . . ." (Petition at A. 12)

Thus, the Illinois Business Corporation Act of 1933, Ill. Rev. Stat. ch. 32, § 157.160 (1975) and the Illinois Act to Increase the Powers of Railroad Corporations, Ill. Rev. Stat. ch. 114, § 166 (1975) were not a prohibition to the sale of the Illinois Central Railroad Company. This is particularly so since the Illinois Supreme Court refused to interpret these acts of the state legislature, 34 years or more after the enactment of the charter, to prohibit the sale. (Petition at A. 11)

The Plan of Reorganization was approved by the Interstate Commerce Commission on December 20, 1971, 338 I.C.C. 805 (1971), and carried out on or about August 10, 1972. (R. C939-940) On August 14, 1972, the Illinois Central Railroad Company tendered a certificate of dissolution to the Illinois Secretary of State. (R. C220) Without shareholders, officers, property, or the right to do business, the Illinois Central Railroad Company was dissolved by operation of law. *Rochester Ry.* v. *Rochester*, 205 U.S. 236 (1907). Although the petitioners herein deny such a dissolution, they made no attempt to litigate the issue prior to their appearance in the Illinois Supreme Court. Although the State was invited to participate in the hearings before the Commission as an interested party pursuant to Section 5(2)(b) notice, it failed to do so. And although the circuit court repeatedly requested the petitioners to file a counterclaim raising the dissolution, (R. C1081-1084, C1092) the State officials elected not to plead

the issue. (R. C1096-1097). Having waived their rights to litigate the dissolution issue before the Commerce Commission and in the state courts, and having failed to raise or preserve any Federal or Tenth Amendment question in the courts below, the petitioners may not now in this Court attempt for the first time to create a question of federal magnitude.

Approval of the Plan of Reorganization, including the dissolution of the Illinois Central Railroad Company, being the only question properly before the Interstate Commerce Commission and necessary for the effectuation of the Plan, it remained for the state courts to determine the impact of the Reorganization on the state taxation scheme. *Thomson* v. *Union Pac. R. R.*, 76 U.S. (9 Wall.) 579 (1870); *People ex rel. Schuler* v. *Chapman*, 370 Ill. 430, 19 N.E. 2d 351 (1937). That determination was purely a matter of state law, a determination of the proper method for the State of Illinois and its political subdivisions to exact taxation from a railroad owning property and operating within the state. The interpretation by the Illinois Supreme Court that the tax exemption and charter tax granted Illinois Central were personal to it and not transferrable to Gulf is in accord with the entire body of law which has examined railroad charter rights. *Yazoo & Mississippi Valley R.R.* v. *Vicksburg*, 209 U.S. 358 (1908); *Rochester Ry.* v. *Rochester*, 205 U.S. 236 (1907); *Yazoo & Mississippi Valley R.R.* v. *Adams*, 180 U.S. 1 (1901); *Chesapeake & O. Ry.* v. *Miller*, 114 U.S. 176 (1885); *St. Louis, Iron Mountain & S. Ry.* v. *Berry*, 113 U.S. 465 (1885); *Memphis & Little Rock R.R.* v. *Berry*, 112 U.S. 609 (1884); *Louisville & Nashville R.R.* v. *Palmes*, 109 U.S. 224 (1883); *Wilson* v. *Gaines*, 103 U.S. 417 (1881); *Atlantic & Gulf R.R.* v. *Georgia*, 98 U.S. 359 (1879); *Morgan* v. *Louisiana*, 93 U.S. 217 (1876); *Cincinnati, Ind. & W. R.R.* v. *Barrett*, 406 Ill. 499, 94 N.E. 2d 294 (1950). That interpreta-

tion of Illinois Central's charter by the state supreme court is conclusive. *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961); *Kingsley International Pictures Corp.* v. *Regents,* 630 U.S. 684 (1959); *Atchison, T. & S.F. Ry.* v. *Railroad Commission,* 283 U.S. 380 (1931). This Court should, therefore, decline to review the Illinois Supreme Court's interpretation of the charter of the former Illinois Central Railroad Company.

CONCLUSION

For the foregoing reasons, respondents County of Cook, Edward J. Rosewell, and Stanley T. Kusper, Jr., respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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